INDEX.

ACTION.

1. *When can not be maintained.*—A promise to pay the debt of another will not support action, unless founded on a precedent liability or a new consideration.—*Underwood v. Lovelace*, 155.
2. *Same.*—Where, however, by the arrangement between the creditor and the promissor, the original debtor is discharged, and a new debt is created binding on the promissor alone, the promise, whether verbal or written, is supported by a valuable consideration—the detriment to the promissee in the extinguishment of the original debt—and will support an action, though no consideration moved from the original debtor to the promissor, and though there was no request from the original debtor, or subsequent assent on his part. (*Overruling, on last point, Williams v. Sims*, 22 Ala. 512.)—*Ib.* 155.
3. *Administrator's bond; what necessary to maintain action on, by creditor of decedent.*—A creditor can not maintain an action at law on the bond of an administrator, until his debt or demand is first reduced to judgment or decree, by a court of competent jurisdiction.—*May v. Kelly*, 489.
4. *Bond; what may be enforced by common law remedies.*—Bonds executed to civil officers, in the course of judicial proceedings, whether authorized by statute or not, if entered into voluntarily, supported by valuable consideration, and not in contravention of public policy or offensive to law, will be enforced by common law remedies.—*Munter & Faber v. Reese et als.* 395.
5. *Corporation; action against, for torts.*—A corporation is civilly liable for torts, or for acts and negligence of its servants or agents while in its employment, to the same extent and under the same circumstances as a natural person; the only limitation being, that it is not liable civilly or criminally for torts, of which malice is an essential ingredient.—*South & North Ala. R. R. Co. v. Chappell*, 527.
6. *Same.*—It is not necessary to fix the liability, that the wrongful act or the negligence from which the injury proceeds, should have been committed while the corporation was in the exercise of powers conferred by the charter; it may have been committed while the corporation, or its servants acting under its authority, were exceeding corporate power, or engaged in transactions wholly foreign to its nature.—*Ib.*
7. *Illegal contract, when action lies on subsequent agreement growing out of.*—All contracts encouraging prostitution, or auxiliary to the keeping of a bawdy house, are void, and the aid of the courts can not be invoked to rescind or enforce them; the principle, however, is confined to the illegal act, or to the original contract, and is not extended to subsequent, new and independent transactions, founded on a new consideration, not a part of the original scheme, though between the same parties and having relation to the same property.—*Lea, Adm'r, v. Cussen*, 312.

ACTION—*Continued.*

8. *Same.*—Parties to a void and illegal contract may rescind it, and place themselves in *statu quo*, no other consideration being necessary than their mutual agreement; and when it is agreed that money paid under the rescinded contract should be restored, an action to recover it back can be maintained upon the agreement of rescission, which is a new and independent agreement, founded on a new consideration, removed from and not a part of the original transaction, and unaffected by its illegality.—*Ib.* 312.
9. *Maintenance; what within the rule against.*—Where the mortgagor, after becoming tenant of the purchaser at the mortgage sale, renounces his tenancy, and thereafter claimed to hold in his own right, upon the purchaser's refusal of an offer and tender for redemption,—this is such an adverse holding as, under the rule against maintenance, will prevent a grantee from the purchaser, during such adverse possession, from recovering the premises, in an action of ejectment in his own name.—*Alexander et al. v. Caldwell*, 543.
10. *Money had and received; when action for, lies.*—The nature of the business considered, the shipper does not stand on equal terms with the carrier, in contracting for charges for transportation; and if the shipper pays the rates established in violation of law by the carrier, rather than forego his services, such payment is not voluntary, in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge.—*M. & M. Railway Co. v. Steiner, McGehee & Co.*, 560.
11. *Trial of right of property; what confers sufficient title to maintain.* H. owed W. and gave him an instrument intended to create a lien for crop advances, but such was not its legal effect. W. obtained possession of a part of the crop from H. with his consent, to pay the debt with it, and sold to S.,—*held:* S. had such title or right of possession as would enable him to maintain a trial of the right of property. *Carter v. Wilson*, 434.
12. *Receipt; on what, action may be maintained.*—A receipt given by the husband to his wife, acknowledging that he had received from her a certain amount of money, for investment, with a like amount of his own, in certain exchange which he purchased, and that the wife was entitled to one half the proceeds when sold,—is not a contract between husband and wife, within the meaning of the statute forbidding their contracting with each other; and a complaint by the wife's administrator against the husband's personal representative, claiming a sum certain as due according to such receipt, which is set forth, discloses a substantial cause of action.—*Haynie v. Miller*, 62.
13. *Detinue; what does not disable vendor from maintaining.*—P. sold and delivered five bales of cotton to M. & Co., at a stipulated price for cash. P. had purchased two of the bales from his son, who owed M. & Co., who on that account refused to pay for them. A third person had a mortgage on the two bales, which P. agreed to satisfy. P. thereupon agreed with M. & Co. that they might pay the mortgage debt out of the agreed price, and the residue to himself, but made no new agreement respecting the price or sale. M. & Co. paid the mortgage debt, but refused to pay the balance to the vendor,—*held:* The vendor was not divested of title, or disabled from maintaining detinue against the purchaser.—*Moore, Waldman & Co. v. Parks*, 409.

For revival and abatement of actions, see PLEADING AND PRACTICE.

ACKNOWLEDGMENT.

See DEEDS.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADVANCES.

1. *Lien for advances to make crop; to what extends.*—The statute as to advances to make crops, gives the advancer, who complies with its terms, a prior lien upon the crops, and stock bought with the money advanced to enable the party to make a crop; but it was not intended, and does not have the effect, of enabling the party, obtaining the advances, to give a lien displacing prior liens on property owned at and before the advances, and not procured with such advances.—*Evans v. English*, 416.
2. *Same; what will not constitute.*—The statute will not give an instrument the privileges of the statutory lien for advances, unless its terms conform to the statutory requirements, and it is founded on the precise consideration expressed in the statute; an instrument securing not only advances, but debts founded on a different consideration, is not what the statute contemplates, and will not give the statutory lien, though if properly framed it may have effect as a mortgage.—*Ib.* 416.
3. *Same.*—A note or other obligation acknowledging an indebtedness for advances to make a crop, &c., will not create a lien on the crop, if in fact the consideration of the note is a mere antecedent debt of the maker: and one not a party or privy to the instrument may contradict its recitals by parol, showing a different consideration from that recited.—*Carter v. Wilson*, 434.
4. *Same; when prior to attachment lien.*—The crop lien is created, when advances are made in compliance with the statute, and not by levy of the attachment, which is but process to enforce an existing lien,—while in ordinary attachments the lien does not begin until the levy; and hence, where property attached for advances is claimed, under a right or title ante-dating the levy, the advancer may recover under his crop-lien, if older than or superior to the right of the claimant, though such right accrued prior to the levy.—*Ib.* 434.
5. *Lien for advances; who can not enforce by attachment.*—The assignee of a note or obligation given for advances to make a crop, can not enforce the lien by attachment; the statute confers the right to that remedy upon the advancer alone.—*Ib.* 434.

See LANDLORD AND TENANT.

ADVERSE POSSESSION.

See EJECTMENT.

AGENT—AGENCY.

1. *Deed of agent; effect of section 2948 of Code on.*—The statute (Code, § 2948,) has not changed the common law rule, that a deed executed by an agent, to be valid and binding upon the principal, must, with certainty, appear to be the deed of the principal, and must be made and executed in his name; and since the statute, as at common law, a deed by an agent, which grants and covenants in the name of the agent alone, is not at law a valid execution of the power, and will not pass the legal title; though equities may arise thereby which a court of equity will protect.—*Jones v. Morris*, 518.
2. *Principal; how may be bound by acts of unauthorized person.*—A single instance of recognition by the principal, of the unauthorized assumption of agency by a third person—as by payment of the debt contracted—in the absence of any warning, caution or notice to the person dealing with the supposed agent, will bind the principal as to him, for other similar contracts of such person; but the rule applies only to the person thus dealt with.—*M. & M. Railway Co. v. Jay*, 247.
3. *Agency; what not sufficient proof of.*—The mere fact that a person claiming to be the agent of plaintiffs, had a statement of an account due them, made out in the handwriting of their book-keeper, is not of itself sufficient proof of the agency.—*Galbreath v. Cole*, 140.

ALTERATION.

See DEED.

AMENDMENT.

See that title, under PLEADING AND PRACTICE, and CHANCERY.

APPEAL.

See ERROR AND APPEAL.

ATTACHMENT.

1. *Affidavit for attachment; what sufficient.*—An affidavit for attachment, made by the attorney of a non-resident creditor, which states that affiant is "*informed and believes, and therefore states,*" that defendant, who is also a non-resident, is justly indebted, &c., is not defective. *Mitchell v. Pitts & Henry*, 219.
2. *Advances; when prior to attachment lien.*—The crop-lien is created, when advances are made in compliance with the statute, and not by levy of the attachment, which is but process to enforce an existing lien,—while in ordinary attachments the lien does not begin until the levy; and hence, where property attached for advances is claimed, under a right or title ante-dating the levy, the advancer may recover under his crop-lien, if older than or superior to the right of the claimant, though such right accrued prior to the levy.—*Carter v. Wilson*, 434.
3. *Lien for advances; who can not enforce by attachment.*—The assignee of a note or obligation given for advances to make a crop, can not enforce the lien by attachment; the statute confers the right to that remedy upon the advancer alone.—*Ib.* 434.

ATTORNEYS.

1. *Fees of; when may be included in mortgage.*—A stipulation in the mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee attorney's fees incurred in collecting the debt, will not render the agreement usurious; but a reasonable amount only can be collected, though a larger sum or per cent. is agreed on.—*Munter & Faber v. Linn*, 493.

AUDITOR.

1. *Inspection of public record in Auditor's office; when denied.*—Where the party has no interest, or the disclosure sought would be detrimental to the public interests, inspection of the records of an executive department of the government may be denied.—*Brewer, Auditor, v. Watson*, 310.
2. *Same; when can not be denied.*—Public interests are not endangered, by allowing a tax-collector, or his attorney, to inspect the collector's account with the State, as kept in the books in the Auditor's office; and if such inspection is requested, and the Auditor denies it, *mandamus* lies against him.—*Ib.* 310.
3. *Auditor; power of, to re-state accounts settled by his predecessor.*—The Auditor in settling a public official's account for one year, has no authority to re-state an account settled and certified by his predecessor in a former year, embracing in the last account items which should have been included in the former, and then by certifying such re stated account, make it presumptive or *prima facie* evidence of its correctness; as to the items thus brought forward, the Auditor's certificate furnishes no evidence of their correctness.—*State ex rel. v. Brewer*, 318.
4. *Same.*—The failure of the Auditor, in settling with a public official, to include items with which he was justly chargeable, will not debar the State from an appropriate action against the officer; but the error must be shown, as in other cases of mistakes in accounting; it can not be

AUDITOR—*Continued.*

proved or shown *prima facie*, by a re-statement by a succeeding Auditor.—*Ib.* 318.

5. *Mandamus; when will not lie to correct re-statement.*—Where it is not averred that the Auditor has certified, or will attempt to certify, as correct, items brought forward from the settlement had in a former fiscal year with his predecessor, or that suit has been brought or threatened to be brought, such alteration of the account works no no harm to the officer; and having an ample remedy in defense of suit, if brought, he is not entitled to *mandamus* to compel the Auditor to strike out such disputed items.—*Ib.* 318.

BILL OF EXCEPTIONS.

1. The bill of exceptions is not the proper place to set forth rulings upon pleadings, and where such rulings are shown only by recitals in the bill of exceptions, they will not be revised.—*Ex parte Knight*, 589.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Who may draw.*—A partnership in the business of buying cattle and slaughtering them for sale, and dealing in vegetables and like commodities, is a commercial partnership; each member of which has the right to draw, accept, or endorse, bills of exchange in the firm name, and bind the partnership, as to third persons, dealing fairly and in good faith, as to matters usually incident to the business; and it is immaterial in such a case, as to a person thus dealing with one of the partners, that the other was not informed of the transaction, and repudiated it as soon as it came to his knowledge.—*Wagner v. Simmons & Co.*, 143.

2. *Note; when maker can not dispute, or inquire into consideration of.* Where the debtor, at the request of the creditor, makes a note payable to a third person, who sues the maker, the latter can not, in that suit, inquire into or dispute the consideration, moving between the creditor and the payee of the note, or show that it had failed.—*Lea v. Cussen*, 312.

3. *Failure to read; will not avoid.*—One who can read and write, and had ample opportunity to read the whole of a note containing a waiver of exemptions, before he signed it, can not, in the absence of fraud or misrepresentation practiced on him, set up his own failure to read the note, in order to avoid its stipulations, or in support of a plea putting in issue the fact of the waiver of exemptions.—*Goetter, Weil & Co. v. Pickett*, 387.

4. *Commercial paper; what defenses may be made to.*—The indorsee of commercial paper acquiring it after maturity, or before maturity merely as collateral security for a pre-existing debt, takes it subject to all the defenses which the maker could prefer against the payee, if he had remained the holder; and this right exists as to matters of set-off and discount, as well as to defenses affecting the instrument itself.—*Wagner v. Simmons & Co.*, 143.

BONDS.

1. *Bond; what may be enforced by common law remedies.*—Bonds executed to civil officers, in the course of judicial proceedings, whether authorized by statute or not, if entered into voluntarily, supported by valuable consideration, and not in contravention of public policy or offensive to law, will be enforced by common law remedies.—*Munter & Faber v. Reese et als.* 395.

2. *Same.*—When the bond in suit was executed, there was no law authorizing a sheriff, who had process for the seizure of specific property in a *detinue* suit, to arrest execution of the order of seizure, upon interposition of a claim by a stranger, and the execution of bond to the plaintiff in the suit, conditioned for the forthcoming of the property,

BONDS—*Continued.*

if the claim was not successfully prosecuted; yet if in mutual misapprehension of the claimant's rights, she executes, and the sheriff accepts such forthcoming bond, and thereon the sheriff delivers the property to her, the plaintiff in the *detinue* suit, though the bond was taken without his consent, may ratify the sheriff's unauthorized act, and upon judgment in the *detinue* suit and return of *nulla bona*, and allegation and proof of failure to prosecute the claim to effect, may recover upon the bond.—*Ib.* 395.

3. *Costs; execution for, against obligors on injunction bond; when register may issue.*—Under our statutes, in all cases where an injunction has been obtained, and costs decreed against the complainant on its dissolution, the register may, without a reference or further order of the court, issue execution for costs, against any or all of the parties to the injunction bond.—*Newsom v. Thornton*, 95.

CHANCERY.

I. Jurisdiction and General Principles.

1. *Bill to establish partnership; when not maintainable.*—A bill will not be entertained to establish a partnership between two persons, settle its dealings, and declare one of them trustee for the benefit of the other as to purchases of real estate, when more than twenty years have elapsed since the accrual of the right, before suit brought, during all of which period the defendant denied and disregarded the rights of the other alleged partner; and the fact that the partners were brothers, complainant being averse to litigation, and on that account failing to sue in time, will not alter the case.—*Phillippi v. Phillippi*, 80.
2. *Stale demands; rule as to.*—Where a claim is sought to be enforced, *prima facie* within the operation of the rule against stale demands, the complainant should show by positive and specific allegations, some act or recognition of the party sought to be charged, within the period which will take the case out of the rule; mere general and vague averments of facts and circumstances, out of which the right sought to be enforced arises, or on which recognition of it is sought to be based, will not suffice.—*Ib.* 80.
3. *Bill to enjoin sale under mortgage; when demurrable.*—A mortgagor seeking to enjoin a sale, under a power in the mortgage, on the ground of usury, must either bring the money and interest into court, or must by his offer submit himself to the jurisdiction of the court, that it may do complete equity between the parties; otherwise, his bill is demurrable.—*Eslava v. Crampton*, 507.
4. *Same.*—Where the bill contains such offer, a decree of foreclosure may be made without any cross-bill; and a cross-bill being unnecessary, it is immaterial whether a cross-bill was formal, or had been properly put in issue.—*Ib.* 507.
5. *Same.*—Answers prayed to be taken as cross-bill in such a cause, whether put at issue or not, authorize the complainants in them to move for a receiver.—*Ib.* 507.
6. *Bill of review; when not maintainable.*—To justify relief on bill for review, under the rule settled by the decisions of this court, the record of the former suit, independent of the testimony, must satisfactorily and distinctly show that the court committed an error of law in the decree reviewed, arriving at an erroneous conclusion of law upon facts found by the record; erroneous inferences from the testimony, or error in denying it proper weight, and the like, are not matters for bill of review, and can be considered only on appeal.—*Tankersly v. Pettis*, 354.
7. *Same.*—Though the averments of the original bill authorize larger or different relief from that specially prayed, the error of not granting relief under the general prayer, can be reached only by appeal, and will not support a bill of review for error apparent.—*Ib.* 354.

CHANCERY—*Continued.*

8. *Heir; when will be enjoined from prosecuting ejectment.*—Lands descended to infants were sold under order of the Probate Court, for division. The sale was confirmed, the purchase-money paid, and a conveyance ordered to the purchaser, but the administrator failed to execute it. The record showed enough to sustain the sale on collateral attack. The administrator made final settlement, accounting for the proceeds of the sale, and the heirs' respective shares thereof were paid to their guardian, who disbursed it for their support. No fraud or unfairness was charged,—*held:* The purchaser acquired a good equitable title to the land; and a court of equity at his instance, or one claiming under him, will enjoin ejectment by the heirs, after attaining majority, to recover the land.—*Bibb v. Bishop Cobbs Orphans Home*, 327.
9. *Bill; when demurrable.*—A bill to foreclose a mortgage of lands by a married woman is demurrable, unless it sets forth the substance, at least, of the deed or other instrument under which the estate is held, that the court may determine the nature of the estate, and her power over it.—*Sprague v. Shields*, 429.

II. Pleading and Practice.

10. *Usury; what allegations as to not sufficient to put in issue.*—A mortgagor who, upon dispute with the mortgagee as to the amount due, files his bill to ascertain the mortgage indebtedness, and for a sale of the property, if necessary for its payment—does not by the general allegation that "from time to time he has made various payments" on the mortgage debt, which reduce it below the amount the mortgagee claims, put in issue the right to credits for payments, beyond eight per cent. per annum, made to the mortgagee not as credits on the debt, but for forbearance, and to induce him not to foreclose, after the debt matured.—*Munter & Faber v. Linn*, 492.
11. *Same.*—Nor in such a case, is the defect of the bill cured, by a consent decree directing the register "to state an account of the amount due the mortgagee upon the mortgage debt, allowing him eight per cent. interest upon the debt after maturity, and deducting therefrom all sums of money paid the mortgagee at the date of the several payments." Such decree, when tested and construed with reference to the pleadings, relates only to payments made as such, on the debt, and not to usurious exactions paid merely for forbearance.—*Ib.* 492.
12. *Amendment; when properly disallowed.*—After final decree settling the equities, a party is not entitled as matter of right to have an amendment allowed, which authorizes the introduction of proof effecting a different result; the chancellor may decline at that stage of the proceedings, to allow it.—*Ib.* 492.
13. *Material defendant, to bill for foreclosure.*—Under our laws relative to the transmission and descent of realty, and the enlarged power of the Chancery Court in foreclosure suits,—which are widely different from the English laws and practice,—the personal representative of a deceased mortgagor is a material defendant to a bill for foreclosure; and the omission is fatal to the decree, and will be noticed *ex mero motu* by the appellate court.—*Dooley v. Villalonga*, 129.
14. *Omission to make administrator a party; what does not cure.*—When no reason is shown why the administrator is not made a party, the appointment of an administrator *ad litem* will not cure the defect. *Ib.* 129.
15. *Reexamination of witness; when not allowed.*—The reexamination of a witness after hearing and final decree, for the purpose of altering or correcting his testimony, as to a matter discussed in court and judicially weighed, opens a wide door for fraud and perjury, and ought not to be tolerated.—*Harrell v. Mitchell*, 270.

CHANCERY—*Continued.*

16. *Petition; what relief can not be granted on.*—Where decree is rendered against co-sureties upon a bond, it is error to modify it, upon petition of one of the defendants, so as to render the other primarily liable for the common burden; if such an equity exists, it must be presented by cross-bill.—*May v. Duke*, 53.
17. *Bill to enjoin collection of judgment; who, not proper party to.*—The sheriff should not be made a defendant to a bill to enjoin the collection of a judgment at law, when his only connection with or interest in the case arises out of the discharge of his duties, as executive officer of the court, in the collection of the execution; the injunction, upon the sheriff's being notified of it, binds him as completely as if he were a party.—*Collier and Wife v. Falk*, 105.
18. *Injunction; when properly dissolved.*—A temporary injunction, granted on the allegations of the bill, without notice to the parties adversely interested, is properly dissolved on the denials in the answer of a sole material defendant, fully and positively denying all the allegations, upon which the equity of the bill is rested, unless the facts be such that the court can find therein some good and substantial reason for retaining the injunction.—*Ib.* 105.
19. *Variance between allegation and proof; effect of.*—The pleadings and proof must correspond, and a material variance between them, however clear may be the equity of the complainant, is fatal to relief. *Helmetag v. Frank*, 67.
20. *Execution on decree in chancery; when erroneous.*—A decree in a foreclosure suit, or bill to enforce a vendor's lien, ascertaining the amount of indebtedness, has the force and effect of a judgment; but execution can not issue thereon until after sale and confirmation and decree ascertaining the balance due.—*Winston v. Browning*, 80.
21. *Decree of sale; what erroneous.*—Where, before bill filed, a fraudulent grantee conveyed parts of the lands to others, and put them in possession, and these persons, though named, are not made parties, nor description given of the portions of land sold to them,—a decree under which such parts of the lands could be subjected, is erroneous, and will be here corrected.—*Harrell v. Mitchell*, 271.

CHARGE OF COURT.

1. *Charge; what erroneous.*—A charge on the trial of the right of property, between the wife and an execution creditor of the husband, that the possession of the husband and wife jointly, is the possession of the husband, is erroneous and properly refused; when the evidence shows the wife had an equitable estate and was a "free-dealer," the law in such a case refers the possession to the title.—*Newbrick & Bros. v. Dugan*, 251.
2. *Charge; what properly refused.*—In trover by the mortgagee against one obtaining cotton from the mortgagor, the fact that the mortgagor told defendant before he took it, that the cotton was set apart for plaintiff, is admissible to show that the defendant knew the cotton was embraced in the mortgage and not being offered or relied on to show title in the plaintiff, the court properly refuses, as abstract, a charge that the mere fact the mortgagor made such declaration vested no title in the plaintiff.—*Steiner & Bro. v. McCall*, 406.

See this Title, under CRIMINAL LAW.

COMMON CARRIER.

See RAILROADS.

CONSTITUTIONAL LAW.

1. *Grand jury; power of legislature to prescribe mode of drawing.*—While the constitution prohibits indictments otherwise than on the present-

CONSTITUTIONAL LAW—*Continued.*

ment of a grand jury, it imposes no restraint or limitation on legislative power in declaring the mode in which the jurors shall be drawn or summoned, or which inhibits the consultation of public convenience in determining whether the jurors shall be selected from the body of the county at large, or from a particular vicinage.—*Williams v. The State*, 33.

2. *Act establishing Perry Court of Quarter Sessions; constitutionality of ninth section of.*—The ninth section of the act establishing the Court of Quarter Sessions for Perry county, requiring that the grand jurors for the November term of the court, shall be drawn from the immediate vicinity in which the court was held, is not violative of the letter, spirit, or purposes, of the constitution.—*Ib.* 33.
3. *Constitutional and statutory provisions with reference to alienation of the homestead; to what, apply.*—The constitutional requirements, and statutes passed to carry it into effect, as to the alienation of the homestead, apply to cases where the owner thereof is a married man, and do not affect a homestead in lands of the statutory estate of the wife, which husband and wife have conveyed in the manner requisite to pass her title to such lands.—*Weiner v. Sterling*, 98.
4. *Homestead; wife's consent to alienation of; what sufficient.*—The constitutional requirement as to the alienation of the homestead, owned by a married man, is satisfied, if the wife gives her "voluntary signature and assent" to the husband's conveyance, though she is not named as a grantor therein, and does not in terms convey anything. *Dooley et al. v. Villalonga*, 129.
5. *Same.*—Though the husband alone bargains, sells, and conveys, as grantor in a mortgage, yet if the power of sale therein proceeds from both husband and wife, and vests the mortgagee with full power to sell the lands in default of payment, &c., and the wife voluntarily signs and assents to the conveyance,—this is a compliance with the constitution, and will pass title to a homestead owned by the husband.—*Ib.* 129.
6. *Homestead exemption of lot in city; what essential to.*—The constitution of 1868 exempted a homestead in a city, town or village, from liability to seizure on legal process, only where the lot and appurtenances did not exceed two thousand dollars in value; and the limitations as to quantity and value not existing, there was no exemption from payment of debts, and no constitutional restraint as to alienation.—*Garner v. Bond*, 85.
7. *Constitution of 1868; effect of, as to power to amend charter.*—The act to constitute the purchasers of any railroad, &c., a body politic and corporate, having been enacted, since article thirteen of the constitution of 1868, became operative, and it, and similar provisions in the present constitution providing that the general laws, under which corporations may be framed, may be amended, altered or repealed, corporations thus formed are subject to legislative control.—*M. & M. Railway Co. v. Steiner, McGehee & Co.*, 560.
8. *Judge; when disqualified.*—A judge related, within the fourth degree of affinity or consanguinity to the slain, is incompetent to try one charged with the murder.—*Gill v. State*, 169.
9. *Constitution, article 6, section 18 of, construed.*—Such relationship, though not falling within the letter of section 540 of the Code, which disqualifies on account of relationship to the *parties*, is a "legal cause" at common law, and also under article 6, section 18 of the constitution, which renders the judge incompetent, and authorizes the prisoner and the solicitor to agree upon a special judge, and in default of such agreement, an appointment by the clerk.—*Ib.* 169.

CODE.

See STATUTE.

COSTS.

1. *Costs; liability of State or county for.*—Neither the State nor the several counties thereof, are liable for costs incurred in the prosecution of offenders against the laws, except to the extent, and in the manner, provided by statute.—*Greene County v. Hale County*, 72.
2. *Code of 1876, section 4917 construed.*—Under the provisions of the Code (§ 4917) when a prosecution begun in one county, is transferred by change of venue to another county, "all fines and forfeitures go to the county in which the indictment was found, and judgment must be rendered accordingly; and the fees of all jurors and witnesses, on being properly certified by the clerk of the court to which the trial is removed, are a charge on the county in which the indictment was found, in like manner as if the trial had not been removed.—*Ib.* 72.
3. *Same.*—Under this section, fees of persons summoned as special jurors, for the trial of an indictment which had been transferred on a change of venue, when properly certified, are payable by the county in which the indictment was found, and not by the county to whose courts the trial was transferred: and if the latter county pays them, it is a voluntary payment, which will not constitute it a creditor of the county in which the indictment was found.—*Ib.* 72.
4. *Costs, execution for, against obligors on injunction bond; when register may issue.*—Under our statutes, in all cases where an injunction has been obtained, and costs decreed against the complainant on its dissolution, the register may, without a reference or further order of the court, issue execution for costs, against any or all of the parties to the injunction bond.—*Ib.* 72.
5. *Costs in criminal cases.*—The court adverts to the excessive penalties which some times arise under the law authorizing offenders to be put to work for payment of costs of conviction, at the rate of not exceeding forty cents per day, and expresses the hope that the matter will undergo early legislative correction.—*McDowell v. State*, 172.

CONTRACT.

1. *Contract; what illegal.*—It is settled, beyond further controversy in this court, that a contract made here during the late war, for the sale of property which the vendor knew the purchaser was buying, to enable him to furnish material to the Confederate States, to aid in the prosecution of hostilities against the United States, is void, and can not now be enforced.—*Ware v. Jones*, 288.
2. *Same.*—There is no difference in principle between such a sale when made directly to the Confederate States, or its agent, and a sale made to an individual who, it was known, expected to profit by it in making contracts with the Confederate States.—*Ib.* 288.
3. *Illegality of consideration; how must be proved.*—Illegality of consideration will not be inferred, when the evidence can reasonably and justly be reconciled with the hypothesis of legality, and he who asserts it, must prove it; but he need not remove all reasonable doubt, as in criminal cases, and it will be sufficient if it produces the degree of conviction essential in civil cases.—*Ib.* 288.
4. *Parties in pari delicto.*—The law does not look with favor or disfavor, as between the parties, upon either party to a contract made in violation of law or public policy, but declares them in *pari delicto*, and abstains from all interference between them.—*Ib.* 288.
5. *Contracts; what illegal.*—All contracts encouraging prostitution, or auxiliary to the keeping of a bawdy house, are void, and the aid of the courts can not be invoked to enforce or rescind them; the principle, however, is confined to the illegal act, or to the original contract, and is not extended to subsequent, new and independent transactions, founded on a new consideration, not a part of the original scheme, though between the same parties and having relation to the same property.—*Lea, Adm'r, v. Cassen*, 312.

CONTRACT—*Continued.*

6. *Illegal contract; right of parties to rescind.*—Parties to a void and illegal contract may rescind it, and place themselves in *statu quo*, no other consideration being necessary than their mutual agreement; and when it is agreed that money paid under the rescinded contract should be restored, an action to recover it back can be maintained upon the agreement of rescission, which is a new, and independent agreement, founded on a new consideration, removed from and not a part of the original transaction, and unaffected by its illegality.—*Ib.* 312.
7. *Written contract; how can not be varied.*—The writings by which a contract is evidenced, in the absence of fraud or mistake in their execution, or any subsequent modification of the contract, are its sole expositors, and can no more be varied, contradicted, or explained by parol, in equity than at law.
8. *Promise; what sufficient consideration for.*—A promise to pay the debt of another, will not support an action, unless founded on a precedent liability or a new consideration; but when, however, by the arrangement between the creditor and the promissor, the original debtor is discharged, and a new debt is created binding on the promissor alone, the promise, whether verbal or written, is supported by a valuable consideration.—*Underwood v. Lovelace*, 155.

See VENDOR AND PURCHASER,
INSURANCE.
SURETY.

CONTRIBUTION.

See SURETIES.

CONVEYANCES.

See DEEDS.

CORPORATIONS.

1. *Corporate existence; when can not be denied.*—In general, whoever contracts with a corporation, in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the corporate existence, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or a right arising under it, is sought.—*Pond & Cahall v. Mutual Building Ass'n*, 232.
2. *General incorporation laws construed.*—The general incorporation laws in force in September, 1871, authorized the formation of a corporation "purchase, hold and convey real estate; to loan money thereon to the members of the association for building purposes," &c.; and the declaratory act of March 3d, 1870, with reference to building and loan associations, did not abridge the capacity conferred on them, when incorporated under the general law, of taking, holding, disposing of or conveying, by lease or fee, real estate so far as limited by its charter, or as its business might require.—*Ib.* 232.
3. *Same; effect of "An act supplementary to the corporation laws of Alabama," approved Nov. 18th, 1868.*—The "act supplementary to the corporation laws of Alabama," approved November 18th, 1868, necessarily repealed all former statutes for the formation of corporations under general laws; and after its passage every original application or declaration for incorporation, was required to be filed in the office of the Secretary of State; and a copy duly certified by that officer, is legal evidence of the incorporation.—*Ib.* 232.
4. *Stockholder; when can not withdraw subscription, or deny corporate existence.*—A subscriber to the capital stock of a bank incorporated by act of the legislature, (which makes the stock a fund pledged for the security of depositors,) upon condition that certain amendments shall be procured from the legislature, and who does not participate actively in an organization then made by the subscribers, with a view

CORPORATIONS—*Continued.*

to the more easy attainment of the desired amendment, but after the failure to obtain it, pays up a portion of the subscription taking a receipt purporting to be the act of the bank, and signed by the cashier, for so much paid on the subscription, and makes no objection to the subsequent carrying on of business by the bank, though it was done with his knowledge, must be regarded as yielding assent to the provisions of the charter, and acquiescing in the organization, and can not withdraw such assent, to the prejudice of a depositor whose rights had already attached, nor to the prejudice of the corporation through whom the right may be enforced, after judgment, by garnishment; and besides, having dealt and contracted with the corporation as such, such subscriber is estopped to deny its corporate existence.—*Lehman, Durr & Co. v. Warner*, 455.

5. *Usurpation of franchise; who can not complain of.*—Whenever there is a legislative grant, under which corporate existence and power claimed could be rightly exercised, no private individual can intervene in a collateral proceeding to complain of a breach of the conditions of the grant, or a usurpation of such franchises. The State which alone can create, may waive the breach or acquiesce in the usurpation, and the wrong being to the State, and not to the individuals, so long as the State remains inactive, the individual must also acquiesce.—*Ib.* 455.
6. *Same.*—The failure of a corporation to organize for more than two years after its incorporation, or to procure and have paid up the minimum amount of capital stock prescribed, before it was authorized to exercise corporate powers, is a wrong to the State, in which it may acquiesce or which it may waive, and the State remaining inactive, a private individual can not complain; and the corporation itself incurs all its liabilities and is estopped from denying them.—*Ib.* 455.
7. *Corporation; action against, for torts.*—A corporation is civilly liable for torts, or for acts and negligence of its servants or agents while in its employment, to the same extent and under the same circumstances as a natural person; the only limitation being, that it is not liable civilly or criminally for torts, of which malice is an essential ingredient.—*South & North Ala. R. R. Co. v. Chappell*, 527.
8. *Same.*—It is not necessary to fix the liability, that the wrongful act or the negligence from which the injury proceeds, should have been committed while the corporation was in the exercise of powers conferred by the charter; it may have been committed while the corporation, or its servants acting under its authority, were exceeding corporate power, or engaged in transactions wholly foreign to its nature.—*Ib.*
9. *Corporation; what duty owes employes, in selection of fellow-servants.* A railroad corporation owes a duty to its employes, to exercise due care and diligence in the selection and appointment of their fellow-servants, and is answerable for injuries resulting from its want of care or skill, in these respects; though if these have been observed, it is not responsible to one servant, for injuries resulting from the negligence of his fellow-servant.—*Tyson v. S. & N. A. R. Co.*, 554.
10. *Same; delegation of power of appointment, effect of.*—Whoever exercises the power of appointing and removing employes or servants, though his grade of employment as to other matters, makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employes, are the negligence or mistakes of the corporation, for which it must answer.—*Ib.* 554.
11. *Imposition of penalty; when not invasion of chartered rights.*—Where a law when a corporation is formed, or which it afterwards accepted, exacts certain duties of it, a subsequent statute imposing a penalty,

CORPORATIONS—*Continued.*

where none existed before, for a failure to perform such duties, does not impair any corporate right or otherwise violate the constitution. *M. & M. R'y Co. v. Steiner, McGehee & Co.* 559.

See RAILROADS.

COUNTIES.

See COSTS.

CRIMINAL LAW.

ABUSIVE AND VULGAR LANGUAGE.

1. *Code, section 4203 of; construed.*—The statute against the use of abusive, vulgar, or insulting language, (Code, § 4203,) is not violated, unless such language is used at a place, agd in the presence of the persons, or some one of them, specially mentioned in the statute.—*Ivey v. State*, 58.
2. *"Curtilage," as used in this statute; meaning of.*—The "curtilage," within the meaning of this statute, includes the yard, garden or field, which is near to and used in connection with the dwelling, though not enclosed.—*Ib.* 58.

ACQUITTAL.

See VERDICT, JUDGMENT AND SENTENCE.

APPEAL.

See REVISION OF JUDGMENT, under this Title.

CHARGE OF COURT.

3. *Charge; when properly refused.*—A a charge based on a state of facts, of which there is no evidence, is abstract, and properly refused.—*Bain v. State*, 75.
4. *Same; what erroneous.*—A charge given by the court, of its own motion, which authorizes a conviction, though the offense was not committed within the county, and within the period prescribed as a bar to the prosecution, is erroneous, and compels a reversal.—*Ib.*
5. *Same; when not error to refuse.*—Where the offense charged includes a lesser, value being a material element of the higher offense only, a charge so worded as to lead to an acquittal entirely, upon a reasonable doubt as to value, is properly refused.—*Hudson v. State*, 334.
6. *Larceny; corpus delicti, charges as to, what erroneous.*—It is not indispensably necessary to establish the *corpus delicti* in larceny, where there is no direct proof of the felonious taking of goods, found in the recent and unexplained possession of defendants, and forming part of a stock of merchandise, which might have been disposed of in due course of business by the proprietor of the store, or any one of several of his clerks, that all those having authority to dispose of the goods should be called and testify severally, that they had not disposed of them. A charge in such a case, which is so worded, as to lead the jury to infer that it was the duty of the prosecution to make positive proof, that neither the proprietor nor his clerks sold the goods, before the defendants could be convicted, is misleading, and properly refused on that account.—*Roberts and Williams v. State*, 401.

CORPUS DELICTI.

See EVIDENCE, under this Title.

DISCHARGE.

See VERDICT, JUDGMENT AND SENTENCE, under this Title.

CRIMINAL LAW—*Continued.*

ELECTION.

7. *Election by prosecution; what does not amount to.*—The introduction of a witness who testified to seeing the defendant commit a larceny on three successive days, she being alone on the first two occasions, but present with her son on the last, is not of itself, in the absence of any attempt on the part of the State to particularize or identify either of the offenses, an election to proceed for a conviction on either of the larcenies committed in the son's absence.—*Peacher v. State*, 22.

EVIDENCE.

8. *Evidence; what relevant in proof of motive, &c.*—Where an offense is committed against the person or property, the relations existing between the accused and the injured person, or acts or declarations of the prisoner, manifesting untriendliness or hostility, at and prior to the commission of the offense, are relevant evidence, in connection with the other facts and circumstances, as tending to connect the prisoner with the offense.—*Hudson v. State*, 334.
9. *Same.*—Thus, on trial of an indictment for arson of the prosecutor's mill, it may be shown that the prisoner had had prior difficulties with the owner; that he and others had prosecuted the mill owner for a nuisance, and remarked that some of those engaged in the prosecution would yet burn the mill.—*Ib.* 334.
10. *Same; effect and weight of.*—The jury must determine, in view of all the facts and circumstances of the particular case, what weight such evidence should have; and though the time elapsing between the formation of the hostile relations, or acts manifesting it, and the commission of the offense, may greatly weaken the evidence, it does not render it inadmissible.—*Ib.* 334.
11. *Same; what evidence irrelevant.*—A defendant who has been allowed to show that others stood in the same relation as himself towards the prosecutor, and had the same motive to commit the offense, can not complain that he was not permitted to show who such other persons were.—*Ib.* 334.
12. *Evidence; what irrelevant.*—Where the quarrel arose about taking planks out of deceased's porch by defendant, and the latter when deceased asked why it was done, replied in an angry and threatening manner, without giving any reason for his act, leaving deceased entirely uninformed as to the reason, after which they separated, and defendant, about an hour afterwards, meeting deceased, without any subsequent altercation between them, or mutual blows, struck the fatal blow,—proof that defendant removed the plank by direction of the common superior of himself and deceased, having no tendency to influence the conduct of the deceased, or to justify or mitigate the act charged against the prisoner, is inadmissible.—*Steele v. State*, 213.
13. *Larceny; corpus delicti, how proved.*—It is not indispensably necessary to establish the *corpus delicti* in larceny, where there is no direct proof of the felonious taking of goods, found in the recent and unexplained possession of defendants, and forming part of a stock of merchandise, which might have been disposed of in due course of business by the proprietor of the store or any one of several of his clerks, that all those having authority to dispose of the goods should be called and testify severally, that they had not disposed of them.—*Roberts and Williams v. State*, 401.
14. *Same.*—In such a case, the testimony of the clerks introduced as witnesses, and suspicious circumstances connected with the possession, may authorize the jury to find that the goods were stolen; though until that fact is found, the defendants are not called on to explain their possession.—*Ib.* 400.
15. *Corpus delicti; what sufficient proof of.*—Appellant was on trial for the

larceny of a hog. The hog alleged to have been stolen was, with a number of others, kept in a lot, and disappeared during the absence of the owner, without breaking the enclosure. Evidence was introduced tending to show that the defendant and his wife had in their possession, about the time the hog disappeared, a large piece of meat and portions of the body of a hog which in size and color of the hair corresponded with that which might have been obtained from the hog that was gone; that this meat was, after being discovered, put away and concealed by the defendant's wife, and that there was prevarication on the part of the defendant and his wife in regard to the meat. After the defendant had examined several witnesses in his behalf, he moved the court to discharge him, on the ground that the *corpus delicti* had not been proved,—*held:* That the court rightly overruled the motion, and allowed the jury to pass on the evidence.—*Colquitt v. State*, 48.

16. *Age of witness; what evidence of admissible.*—A witness may testify to his own age, though he states that his knowledge is derived from what his mother told him; and the fact that his mother, who was not shown to be dead, or out of the jurisdiction of the court, was not introduced, does not affect the admissibility of the evidence, though the jury may consider it, with the other circumstances of the case, in determining its credibility.—*Bain v. State*, 76.

17. *Proof of handwriting; what evidence not admissible.*—It is error to allow a witness, who confesses having written the forged instrument under the direction and at the request of the prisoner, to write in the presence of the court and jury a similar instrument, for the purpose of comparison between the two, or to sustain such witness, when impeached.—*Williams v. State*, 33.

18. *Res-gestæ; what not part of, and inadmissible in favor of prisoner.* The fact that the prisoner an hour after the difficulty, in which he struck the fatal blow, made complaint of being hurt himself, or that he next day made an affidavit or complaint before a magistrate, against the deceased, is no part of the *res-gestæ*, and is inadmissible on the prisoner's behalf, when tried for murder.—*Steele v. State*, 213.

19. *Expert, opinion of; when admissible.*—A physician and surgeon of "long experience with gun-shot wounds, and an expert in such matters," who saw the body of the deceased shortly after she received a wound, may give his opinion as to how it was inflicted.—*Rash v. State*, 89.

20. *Same.*—One who had been in the late war, and "saw the range of balls in a good many gun-shot wounds, but was not a physician, or a surgeon, or an expert," can not be permitted to testify as to "how the balls range, and some of the wounds which the witness had seen." *Ib.* 89.

21. *Same.*—A medical man, though not personally cognizant of the facts, may give his opinion as to the result of a wound or the cause of death, upon the facts proved on the trial; but where the facts are disputed, he can not give his opinion on the case on trial, but must be examined hypothetically, and his opinion on the state of facts which the jury regard as proved, then becomes evidence.—*Page v. State*, 16.

22. *Variance; when fatal to conviction.*—The names of the parties to a judicial proceeding, in which the false oath was taken, must be correctly stated, that the proceedings may be accurately identified; and if not correctly stated, the variance is fatal—as where the suit described in the indictment was against *Cobbs*, and that of which the evidence was given was against *Cobb*.—*Jacobs v. State*, 448.

23. *Variance; what does not constitute.*—The mere mis-spelling in the indictment of the name of the injured person, is immaterial, if the pronunciation of the name proved is satisfied by the manner in which it

CRIMINAL LAW—*Continued.*

is written—*e. g.*—as where the name is spelled *P-r-e-y-e-r*, and pronounced as if written *Preyer* or *Prior*.—*Page v. State*, 17.

EXCEPTION.

See REVISION OF JUDGMENT, under this Title.

FORGERY.

24. *Forgery; what subject of.*—A writing in words and figures as follows: "Uniontown, August 23, 1878. Mr. Cohen.—Please send me ten dollars, and I will sell some cotton next *weak* and pay you the money back. Henry Goldmon," may be the subject of forgery.—*Williams v. State*, 33.

FRAUDULENT PACKING OF COTTON.

25. *Fraudulent packing of cotton; what not necessary to constitute offense denounced by section 4398 of Code.*—To constitute the statutory offense of fraudulently packing or baling cotton (Code, § 4398) it is not essential that the sand or other worthless foreign substance, fraudulently baled or packed with the cotton, should be put into the interior of the bale and concealed by surrounding or plating with clean cotton, so as not to be detected by the ordinary modes of sampling; nor does it matter whether such worthless foreign substance is put in the cotton while in the gin-house, or at the press while the cotton is being packed in bales.—*Daniel et al. v. State*, 4.

GAMING.

26. *"Table for gaming;" what constitutes.*—Any table kept and used for gaming is "a table for gaming," within the meaning of the statute (Code, § 4208); though it has no peculiar devices or appliances, and is not necessarily used in playing any particular game.—*Toney v. State*, 1.

HARD LABOR.

See VERDICT, JUDGMENT and SENTENCE, under this Title.

HOMICIDE.

See EVIDENCE 12, under this Title.

INDICTMENT.

27. *Sufficiency of indictment.*—An indictment for larceny of a hog, not alleging any value, can be upheld only under the act of February 20, 1875, which makes the stealing of such an animal a felony, without regard to value; and a general verdict of guilty on such an indictment authorizes sentence for grand larceny.—*McDowell v. State*, 172.

28. *Same.*—Although our statute has dispensed with many of the allegations necessary in a common law indictment for perjury, it still requires, in addition to the general averment of authority to administer the oath, that the indictment should set forth the substance of the proceedings, that it may distinctly appear that the oath was taken on an occasion, in reference to a matter, and before an officer, or court, having authority to administer it; an indictment not setting out enough of the proceedings to disclose these facts, is insufficient; so, also, if it sets out the proceedings, and does not disclose that the oath was lawfully taken.—*Jacobs v. State*, 282.

29. *Same.*—In robbery, where the indictment describes the property taken from the person as "thirty dollars in greenbacks, national bank-notes, gold or silver coin of the United States," the property of a specified third person, it must be construed as a charge of taking "dollars of of greenbacks, *or* national bank-notes, *or* gold *or* silver coin of the United States," and if the taking of any one of these things should

CRIMINAL LAW—*Continued.*

not amount to robbery, the indictment would be bad.—*Wesley v. State*, 282.

30. *Code, section 4130 of; indictment under, when sufficient.*—The offense defined in section 4130 of the Code has three main ingredients; first, a prisoner confined under a lawful charge or conviction of felony; second, the conveying into the jail, &c., of some disguise or instrument useful to aid the escape; and third, the intent thereby to facilitate the escape of such prisoner; and an indictment charging the offense substantially in the language of the statute is sufficient, though it does not aver that the defendant knew the prisoner was confined on a charge of felony.—*Wilson v. State*, 151.

31. *Indictment; what insufficient.*—An indictment which merely charges a sale of vinous or spirituous liquor, without license and contrary to law, &c., is insufficient as to cases falling under sections 4204 and 4274 of the Code of 1876; in this one case it is necessary to aver that the liquor was drank about the premises, and in the other, that the accused "did engage in or carry on the business," &c.—*Ulmer v. State*, 208.

32. *Same.*—An indictment which charges merely that the defendant engaged in or carried on the business of a wholesale liquor dealer at a specified place, against the peace, &c., is fatally defective; to constitute a charge for violation of the revenue law, it should aver that the business was carried on without license.—*Koopman v. State*, 70.

33. *Same; what indictment sufficient, since act of December 3d, 1878.* Since the enactment of December 3d, 1878, it would seem that the form of indictment pursued in this case is sufficient, in cases where a retailer sells vinous or spirituous liquor, of any kind, in any quantity less than one quart, or in any quantity, if the same, or any portion thereof, is drank on or about his premises. It has no reference to offenses by licensed retailers, or to the offenses defined in sections 4205 and 4206.—*Ulmer v. State*, 208.

34. *Offense; how must be charged.*—Where a statute creating an offense, declares that it may be committed by certain specified acts or means, or by other generic acts or means which are not described, an indictment under the statute for an act other than those particularized, or charging such acts in the alternative with the acts specified in the statute, must charge the acts which the statute does not specially define, in unambiguous words belonging to the plain and proper language of the country, and not in slang words or vulgarisms, or words used in a technical sense in some peculiar employment or business. *Daniel et al. v. State*, 4.

35. *"Sand-packing," use of term in indictment, does not render it ambiguous.*—In view of the general concern of the people of the State in raising cotton, preparing it for market, and selling and purchasing it, the words "sand-packing" have become so generally understood among the people, that they can not be said to be ambiguous or merely technical; and the use of these words in an indictment for the false packing of cotton, will not render it ambiguous, or insufficient.—*Ib.* 5.

36. *Fraudulent intent; what sufficient averment of.*—When the intent to defraud or injure is an ingredient of an offense, the indictment may aver it generally.—*Williams v. State*, 33.

37. *Greenbacks.*—The term "greenbacks" is a slang word, and by itself, without connection with something else indicating the notes called by that name, is not a proper denomination for them in an indictment; but in robbery, the kind and value of the property so taken, is immaterial so long as it is of any value; and "greenbacks," designated in the indictment as "thirty dollars of greenbacks," having been ascertained by the verdict to be the *property* of the prosecutor, and feloniously taken from his person by violence,—the court properly passed sentence on the verdict.—*Wesley v. State*, 282.

CRIMINAL LAW—*Continued.*

INTENT.

38. *Illegal act; presumptions as to intent to commit.*—Whenever one does an act which is in itself illegal, the law presumes the intent to do that act, and the act itself is evidence of the intent; hence where one sells or gives spirituous liquors, &c., to a minor, &c., without the requisition of a physician, the gift or sale is evidence of the intention, and there can be no inquiry as to whether the defendant had the "*specific intent*" to violate the law.—*Bain v. State*, 76.

JEOPARDY.

See VERDICT, JUDGMENT AND SENTENCE, 43, under this title; also, JURIES AND JURORS, 54.

JUDGMENT, VERDICT and SENTENCE.

39. *Arrest of judgment; what not ground for.*—Judgment will not be arrested, because the christian name of the owner of the stolen property was designated by initials only, instead of being given in full; especially where the prosecutor wrote his name as set forth in the indictment, and was as well known when designated in that way, as when his christian name was given in full.—*Lyon v. State*, 224.

40. *Arrest of judgment; what not grounds of motion for.*—It is not ground of motion in arrest of judgment, on a general verdict of guilty upon an indictment in the Code form, not specifying the particular time of the commission of the offense,—that it is not affirmatively shown by the record, whether the conviction was for an act committed before or after the passage of a statute, which punished as a felony, an act which before was only a misdemeanor; it must be presumed, in the absence of a bill of exceptions showing the contrary, that the judgment which the evidence demanded was rendered.—*McDowell v. State*, 30.

41. *Verdict of guilty as to one count; effect of.*—A verdict finding the defendants guilty on a particular count of the indictment, operates as an acquittal as to the other counts.—*Walker v. State*, 30.

42. *Nolle prosequi; effect of entry of, as to one count.*—An entry of *nolle pros.* as to one of several counts of an indictment, before the defendant is put in jeopardy by the empanneling and swearing of the jury for his trial, does not effect his acquittal of the count, but merely destroys that count, leaving the indictment as though the count had never been in it.—*Ib.* 30.

43. *Same.*—Several persons were jointly indicted, in an indictment containing two counts, the first charging arson in the first degree, and the other in the second. When the case was called for trial four of the defendants appeared, and by leave of the court, the "State entered a *nolle pros.* as to the first count of the indictment; and the defendants pleaded guilty as to the remaining counts, and were sentenced accordingly." At another term, the remaining defendants went to trial on the indictment, on a plea of not guilty, and the jury returned a verdict of guilty as charged in the first count,—*held:* The entry of the *nolle pros.* put an end to the first count as to all the defendants, leaving the indictment as though it had originally contained only the second count; and having been in jeopardy as to the second count, the defendants could not be again tried for that offense; but the first count having been put out of the indictment, there was nothing in it to authorize a verdict of guilty on that count; and though the jury found a verdict of guilty of that offense, the defendants were never in jeopardy under that charge, and could be again indicted and tried for arson in the first degree.—*Ib.* 30.

44. *Discharge; when prisoner not entitled to.*—When a demurrer is sustained to an indictment, or it is quashed or otherwise vacated, the discharge of the prisoner does not necessarily follow; but the court in the exercise of the authority which inheres in it, without the aid of

CRIMINAL LAW—*Continued.*

statutes, may, if it deem it proper, hold the accused to answer a new indictment, without hearing testimony, or calling witnesses to show his guilt.—*Ex parte Graves et al.*, 381.

45. *Hard labor for county; when may be imposed.*—The court traces the origin of section 4296 of the Code of 1876, which authorizes the imposition of hard labor for the county for not less than *ten* years on conviction of murder in the second degree, and also of § 4450 of the same Code, which requires that "in all cases where the period of imprisonment or hard labor is for more than *two* years, the sentence must be imprisonment in the penitentiary; and as the act from which the provisions of section 4450 was taken, was passed long after the statute incorporated in section 4596, and necessarily repealed inconsistent provisions of the Code and laws extsting at its passage, full effect must be given to section 4450; and the result is, that the words "*or sentenced to hard labor for the county*," are stricken out of section 4296 of the Code, and all other of its provisions, which fix as punishment for crime, imprisonment or hard labor for the county, for a longer period than two years.—*Steele v. State*, 213.

JURIES AND JURORS.

46. *Venire; what not good ground of objection to.*—A mistake in writing out in the list served on the prisoner, the surname of one of the jurors specially summoned for the trial of a capital felony, is not ground for quashing the venire, or stopping the trial; such name should be discarded and another juror summoned.—*Rash v. State*, 89.

47. *Challenge to juror; when right of, waived.*—After jurors have been accepted and sworn, it is too late to enter into further inquiry as to their qualifications, or to challenge any of them.—*Ib.* 89.

48. *Service of list of jurors on prisoner; presumption as to.*—In the absence of anything showing the contrary in the record, and of any question made in the court below, it will be presumed that the list of names of persons summoned as jurors for the trial of a capital felony, was duly served upon the prisoner as required by law.—*Ib.* 89.

49. *Juror; presumption as to qualification of.*—Where the name of a person was drawn, whereupon he was accepted as a juror, and the defendant, his peremptory challenges having been exhausted, did not object, it must be presumed, the record being silent on the subject, that the juror possessed proper qualifications.—*Ib.* 89.

50. *Venire; what not ground for quashing.*—It is not ground for quashing the *venire* summoned for the trial of a capital offense, that it included the names of two of the regular jurors for the week, who, on a previous day, had convicted prisoner's co-defendant, as to whom there had been a severance; such persons may be challenged for cause.—*Wesley v. State*, 282.

51. *Challenge for cause; what not ground of, by prisoner.*—It is not ground of challenge by the prisoner, that a juror has a fixed opinion against capital or penitentiary punishment; neither can the prisoner complain of the action of the State in waiving such cause of challenge.—*Ib.* 282.

52. *Grand jury; objection to organization of, when may be raised for first time in appellate court.*—Our statutes specifically prescribe the mode of organizing grand juries; and whenever the records of a court affirmatively disclose that a body of men has been organized as a grand jury in violation of these statutes, all the acts of such body must be held void; and no laches of the accused will cure the irregularity.—*Finley v. State*, 201.

53. *Grand jury, organization of; what illegal.*—The statute specifically defining how a deficiency in the panel of grand jurors shall be filled, and by whom this must be done, and what order the court must make, any order which confines the sheriff in summoning grand jurors to a

CRIMINAL LAW—*Continued.*

portion only of the persons from whom the statute declares such jurors shall be drawn, or the effect of which, directly or indirectly, is the assumption of the duties required of him,—as where upon deficiency in the panel, "by order of the court a sufficient number of names, to complete the grand jury, from the by-standers in the court-room, were placed upon slips and regularly drawn," and the jury thus completed—is illegal? and the body of men thus organized, does not become a lawful grand jury.—*Ib.* 201.

54. *Jeopardy; when does not arise.*—An indictment found by such a body of men being of no legal validity, no jeopardy arises on a trial under it.—*Ib.* 201.

LARCENY.

55. *Larceny of part of outstanding crop; proof, what necessary to constitute.* One hired to pick cotton, who after gathering it converts it to his own use, can not be convicted of the statutory offense of "larceny of part of outstanding crop," unless at the time of gathering it, he had the present felonious intent to steal it; and where he had the right to retain possession, until the cotton was weighed at the close of the day, the mere fact that after picking the cotton he secreted it, will not of itself justify the finding that he had the felonious intent to steal it, at the time he was picking it.—*Lyon v. State*, 224.

LOTTERY.

56. *"Tuskaloosa Scientific and Art Association," charter of; does not authorize lottery.*—The charter of the "Tuskaloosa Scientific and Art Association," &c., approved February 3d, 1866, construed, and the conclusion declared that it does not authorize a lottery on the numerical or combination plan; or on any other plan where money or its equivalent is offered or distributed as premiums.—*Boyd v. State*, 177.

PERJURY.

57. *Perjury; what necessary to constitute.*—The materiality to the issue or point of inquiry, which is necessary to constitute perjury, is not confined to matters involved in issues of fact formed during the course of the proceedings, or where the affidavit can be used as evidence on the trial of such issues; it is enough, if the matter falsely sworn to, is material to the point of inquiry at the time it is made.—*Jacobs v. State*, 448.

58. *Same; what sufficient to constitute.*—A plaintiff in an action of *detinue*, who is without right or title which will support the action, and who wilfully and corruptly swears falsely to an affidavit of ownership, thereby procuring an order of seizure from the officer issuing the summons, is guilty of legal perjury; such affidavit, though purely cautionary, and incapable of being used as evidence at any subsequent stage of the proceedings, is material to the point of inquiry at the time it was made, and tends to the abuse of the administration of justice. *Ib.* 448.

REVENUE LAW—VIOLATION OF.

59. *Code of 1876, section 4204 et. seq. construed.*—One of the three offenses embraced in section 3618 of the Revised Code was entirely omitted from the Code of 1876. Section 4204 of that Code punishes the sale of vinous or spirituous liquor, without license, in any quantity, when drank about the premises; and the succeeding section punishes a sale, whether with or without a license, to minors or persons of known intemperate habits; but the third offense,—selling vinous or spirituous liquor in any quantity less than a quart,—was entirely omitted; and hence from December 9th, 1877, the date when the Code of 1876 went

CRIMINAL LAW—*Continued.*

into effect, until the statute of December, 30th, 1878, which remedied the defect, there was no law punishing the selling, without license, of vinous or spirituous liquor in any, the smallest quantity, unless it was drank on the premises, or unless the seller "*engaged in, or carried on*" the business without license.—*Ulmer v. State*, 208.

60. *Same; what cases covered by section 4800 of Code of 1876.*—Under section 4806 of the Code, an indictment charging that the defendant "sold vinous or spirituous liquor, without license and contrary to law," &c., is sufficient, when an unlicensed "retailer," sells liquor of any kind in any quantity, if the same is drank on or about his premses, and is also good for violation of any special and local laws; that section, however, applies only to unlicensed retailers that were punishable under the Code of 1876, and is not sufficient in prosecutions under sections 4205 and 4206 of that Code.—*Ib.* 208.

61. *Engaging in or carrying on business, within the meaning of the revenue law.*—One who, without license, engages in the business of selling liquor in quantities of a quart or more, is a wholesale liquor dealer within the meaning of the law, and guilty of a violation of its provisions, though the liquor was kept and sold by way of variety merely, "rather to accommodate regular customers than for profit, and constituted a minor part of a general merchandise business,"—if thereby the dealer intended to reap a profit, directly or indirectly in his business.—*Koopman v. State*, 70.

REVISION OF JUDGMENT.

62. *How judgment in a criminal case may be revised.*—Under the laws now in force, two remedies are available to a defendant for the revision of the judgment of conviction; each of which has a different field of operation.—*Ex parte Knight*, 483.

63. *Same.*—He may obtain such revision, by reserving, in the court of original jurisdiction, a question of law for the consideration of the appellate court, the reservation distinctly appearing of record; when this is done, no further act of the defendant is necessary to suspend the sentence, or to call into action the revisory judgment of this court, which under the statute must take jurisdiction of the whole case, and may reverse not only for error as to the question reserved, but for any other error apparent on the record.—*Ib.* 483.

64. *Same; how reservation must appear.*—In such case, where the question of law reserved arises on the indictment or ruling upon a plea, motion, or the like, the judgment upon which must appear of record, the reservation must be distinctly presented on the record; it is not the office of a bill of exceptions to present such matter.—*Ib.* 483.

65. *Same.*—If the reservation is as to matter not appearing of record, the question must be presented by bill of exceptions, duly taken and signed; and whether the matter is shown by the record, or can be presented only by bill of exceptions, the reservation must be distinctly shown, and must be made at the time of the decision complained of.—*Ib.* 483.

66. *Same; remedy when no question is reserved.*—When no question of law has been reserved, the defendant may obtain a revision of the judgment by common law writ of error. Such writ, however, is grantable only by this court in term time, or by a judge thereof in vacation, and then only for error of law apparent of record; though the writ when granted, operates a suspension of the judgment of conviction.—*Ib.* 483.

67. *Same; what does not amount to reservation*—Merely excepting to the judgment of conviction, and causing that fact to be recited in the judgment-entry, is not tantamount to the *reservation* of any question for the consideration of the appellate court, and furnishes no predicate for suspension of sentence, or the exercise of jurisdiction by this court under the statute.—*Ib.* 483.

CRIMINAL LAW—*Continued.*

SELLING LIQUOR TO MINORS, &C.

68. *Code, section 4205; construed.*—Under section 4205 of the Code, a sale or gift of liquor to any of the class of persons therein mentioned, is unlawful, unless made "*upon the requisition of a physician for medicinal purposes;*" and this "requisition" must be a verbal or written application or request to the seller by the physician himself.—*Bain v. State*, 76.

TRESPASS TO REALTY.

69. *Trespass to realty; section 4417 of Code construed.*—Section 4417 of the Code, with reference to trespass to realty, makes offenses out of certain acts which were mere civil trespasses at common law, and divides these offenses into two classes.—*Johnson v. State*, 9.

70. *Same.*—The first clause of the section punishes wilful and malicious trespasses on the lands of another, "by cutting down or destroying wood or timber growing thereon, or severing from the freehold any produce thereof," &c.; and to constitute the offense, the prohibited acts must be done wilfully and maliciously, with malice directed to the owner of the premises—it is not necessary that there should be any *asportavit*, or that the trespass be committed *lucri causa*.—*Ib.* 9.

71. *Same.*—The second clause, providing for the punishment of any one taking or carrying away from the freehold any thing thereto attached, under such circumstances as render the trespass a larceny, if the thing severed and taken away were personal property, was intended to enlarge the operation of the statutes for the suppression of larceny; and to constitute an offense under this branch of the statute, felonious intent, or act done *causa lucri*, is a fundamental inquiry, while malice to owner is not.—*Ib.* 9.

WITNESS.

See EVIDENCE, under this Title.

WRIT OF ERROR.

See REVISION OF JUDGMENT, under this Title.

CUSTOM.

1. *Custom; what not sufficient to show.*—The mere act or habit of a railroad company, in paying for medical services rendered to employes injured in its service, does not necessarily establish a custom of such business; before it can have that effect, it must be shown to have been so generally known, and so well settled, as to raise the presumption that the services were rendered in reference to it.—*M. & M. Railway Co. v. Jay*, 247.

DAMAGES.

1. *Damages against sheriff for failure to pay over money; what motion sufficient to support judgment for.*—The statute prescribes the damages recoverable of a sheriff in a summary proceeding for failure to pay over money collected on execution; and if the motion sets forth the facts with sufficient certainty, it is in effect a motion for the damages also, and will support a judgment awarding them.—*McArthur v. Dane*, 539.

DEED.

1. *Deed; when not self proving.*—Unless a deed is properly recorded within twelve months from its date, it is not self proving under section 2154 of the Code.—*Sharp v. Orme*, 263.

2. *Acknowledgment of deed; what sufficient.*—A literal compliance with the forms prescribed by the statute, for the acknowledgment and pro-

DEED—*Continued.*

bate of deeds, will not be exacted; it is sufficient if it fairly appears that the statute has been substantially complied with; and in determining this, the certificate or acknowledgment may be read in connection with the deed.—*Ib.* 263.

3. *Same; how may be proved.*—Where a grantor wrote his name to a conveyance, which was not attested, but acknowledged before a justice of the peace, the certificate of acknowledgment operates as a substitute for the attestation of a witness; and where the deed was not recorded within twelve months, the party wishing to introduce it, may, upon showing that the officer is without the jurisdiction of the court, prove his handwriting, and thereby render the deed admissible.—*Ib.* 263.
4. *Deed, alterations in; presumptions as to.*—Material alterations of a deed after its delivery, can be made operative only by a new attestation or acknowledgment. Where interlineations appear in the handwriting of the grantor, merely curing an imperfect description of the lands, and according with all the purposes and objects of the deed, the fair presumption is, that the interlineations were made before the acknowledgment of execution; and the burden of repelling the presumption, rests on the party asserting the contrary.—*Ib.* 263.
5. *Same; what alteration not sufficient to avoid.*—An innocent alteration made by the grantor, after the delivery of the deed, to cure his own inadvertence and make the instrument accord with its purposes and objects, will not divest the title which has vested by the deed.—*Ib.*
6. *Grantee, what sufficient description of.*—The grantee in a deed must be so described that he can be certainly known; but a deed to the heirs of a named deceased person is sufficient and will pass the legal title; for the persons who are to take, can be identified by extrinsic testimony.—*Jones v. Morris*, 518.
7. *Code; section 2948 of; construed.*—The purpose and scope of section 2948 of the Code, are to dispense with a seal as an essential element of a legal conveyance of lands, and to leave the sufficiency of every written instrument for that purpose, when executed in the prescribed mode, dependent on the intention of the grantor to be collected from the terms of the whole instrument; it was not the intention of the statute to blot out all the common law principles, which, for the security of the titles to real estate, required greater solemnity in the execution of such conveyances, than in the case of mere simple contracts under seal.—*Ib.* 518.
8. *Same.*—Though a seal is not now essential to a conveyance of the legal estate in lands, the conveyance retains all the operation and effect of a sealed deed at common law, and the estoppel arising at common law out of the recitals or covenants of a sealed instrument, still attaches to the unsealed conveyance, executed according to the requirements of the statute.—*Ib.* 518.
9. *Same; effect of, as to deed by agent.*—The statute has not changed the common law rule, that a deed executed by an agent, to be valid and binding upon the principal, must, with certainty, appear to be the deed of the principal, and must be made and executed in his name; and since the statute, as at common law, a deed by an agent, which grants and covenants in the name of the agent alone, is not at law a valid execution of the power, and will not pass the legal title; though equities may arise thereby which a court of equity will protect.—*Ib.*
10. *Conveyance of husband's homestead; requisites of.*—Prior to the act of April 23d, 1873, the husband's conveyance of his homestead, joined in by the wife, and witnessed or acknowledged in the manner requisite to pass the wife's real estate, was sufficient; after the passage of that act, such conveyance would not pass the homestead, unless the requirements of the statute were substantially pursued.—*Cahall & Pond v. Building and Loan Ass'n*, 235.

DEED—*Continued.*

11. *Same; defective acknowledgment and certificate to wife's assent, how may be cured.*—Where the wife's signature and assent to the conveyance of the homestead have been defectively acknowledged and certified, she may make a new acknowledgment, with the intent to cure the defect, and such acknowledgment, when properly made and certified, will relate back, rights of third persons not intervening, to the date of the original delivery of the conveyance, without any new delivery. *Ib.* 235.
12. *Notary's certificate; how can not be impeached.*—A notary's certificate to such conveyance, in the form prescribed by statute, can not be impeached, without showing that the wife's signature was forged, or that she was subject to duress, or that fraud was practiced on her, with the knowledge of the grantee.—*Ib.* 235.
13. *Homestead exemption; what may be aliened.*—The other conditions concurring, lands of the statutory separate estate of the wife, may be the subject of homestead exemption, and a conveyance of such land in the manner requisite to convey the wife's statutory estate, will pass title thereto, freed from the right of homestead exemption, though the lands constitute the homestead, and there is no separate examination of the wife, apart from the husband, as required by the act of April 3d. 1873.—*Weiner v. Sterling*, 98.

See FRAUDULENT CONVEYANCE.
HUSBAND AND WIFE.
MORTGAGE.

DEFINITION.

See CRIMINAL LAW, 2, 37.

DETINUE.

See ACTION, 13.

DEVISE.

See WILL.

DOWER.

2. *Dower; of what estate wife dowable.*—The use or equity of which the widow is dowable, like the legal estate of which she is dowable, is a use or equity residing in the husband; if there is no legal estate, no use or equity, residing in the husband, the wife is not dowable.—*King v. King*, 479.
2. *Fraudulent conveyance; when wife can not assail.*—A conveyance to hinder, delay and defraud creditors, is voidable as to them, but valid as to the parties to it; and where by such a conveyance the husband, without intending any fraud on his future wife, divests himself of all estate and use in the lands, nothing is left out of which dower can be carved; and the future wife claiming through him at his death, can not dispute the validity of the conveyance, or have a court of equity engraft any use or trust on the lands, based on the husband's fraud, out of which to carve dower.—*Ib.* 479.

EJECTMENT.

1. *Adverse possession; what not necessary to constitute.*—Color of title is not necessary to constitute an adverse possession, on which the statute of limitations will operate, or which will avoid a conveyance by one out of possession; a *bona fide* claim of title openly asserted as hostile to the true owner, renders the possession adverse.—*Ladd v. Dubroca*, 25.
2. *Same; when commences under tax title.*—If a purchaser at tax sale of lands, enters into possession under the purchase, before the delivery

EJECTMENT—*Continued.*

of the deed, *bona fide* claiming title, his possession is adverse from its inception, and not merely from the date of the delivery of the deed; though its delivery may be necessary to constitute color of title.—*Ib.* 25.

3. *Same; what does not break continuity of.*—The forcible interruption of possession by a naked trespasser, redressed by legal remedies, can not be set up by him to break the continuity of an adverse possession. *Ib.* 25.
4. *Paper title; what dispenses with proof of.*—A mortgagor in possession, pleading in bar of ejectment, by one claiming under a purchaser at the mortgage sale, that after the sale he became tenant of the purchaser, and made him the proper statutory offer and tender for redemption, thereby admits of record that such purchaser then had title, and takes upon himself the onus of showing that he redeemed under the statute.—*Alexander v. Caldwell*, 543.
5. *Plea of tender; what insufficient.*—Where the purchaser of lands conveyed under the mortgage sale, brings ejectment against the mortgagor, the latter's plea that, before suit was brought, and within the time prescribed by statute, he tendered the amount required to redeem,—the plea not being accompanied by deposit with the clerk of the amount tendered—presents no defense to the action, and should be rejected, on motion.—*Ib.* 543.

See CHANCERY, 8.

ELECTION.

See CRIMINAL LAW, 7.

ENTRY.

See EJECTMENT, 3.

ERROR, WRIT OF.

See CRIMINAL LAW.

ERROR AND APPEAL.

1. *When appeal or writ of error lies.*—Under the laws now in force, two remedies are available to a defendant in a criminal case, for the revision of a judgment of conviction; each of which has a different field of operation.—*Ex parte Knight*, 482.
2. *Same.*—He may obtain such revision, by reserving, in the court of original jurisdiction, a question of law for the consideration of the appellate court, the reservation distinctly appearing of record; when this is done, no further act of the defendant is necessary to suspend the sentence, or to call into action the revisory jurisdiction of this court, which under the statute must take jurisdiction of the whole case, and may reverse not only for error as to the question reserved, but for any other error apparent on the record.—*Ib.* 482.
3. *Same; how reservation must appear.*—In such case, where the question of law reserved arises on the indictment or ruling upon a plea, motion, or the like, the judgment upon which must appear of record, the reservation must be distinctly presented on the record; it is not the office of a bill of exceptions to present such matter.—*Ib.* 482.
4. *Same.*—If the reservation is as to matter not appearing of record, the question must be presented by bill of exceptions, duly taken and signed; and whether the matter is shown by the record, or can be presented only by bill of exceptions, the reservation must be distinctly shown, and must be made at the time of the decision complained of.—*Ib.* 482.
5. *Same; remedy when no question is reserved.*—When no question of law has been reserved, the defendant may obtain a revision of the judgment by common law writ of error. Such writ, however, is grantable

ERROR AND APPEAL—*Continued.*

only by this court in term time, or by a judge thereof in vacation, and then only for error of law apparent of record; though the writ when granted, operates a suspension of the judgment of conviction.—*Ib.* 482.

6. *Same; what does not amount to a reservation.*—Merely excepting to the judgment of conviction, and causing that fact to be recited in the judgment-entry, is not tantamount to the *reservation* of any question for the consideration of the appellate court, and furnishes no predicate for suspension of sentence, or the exercise of jurisdiction by this court under the statute.—*Ib.* 482.
7. *What not revisable.*—As a general rule, where the loss of a written instrument is sought to be proved, its loss should be shown, before allowing evidence of its contents; but it rests in the sound discretion of the lower court to modify, or change, the rule in a particular case; and the exercise of that discretion is not revisable.—*Conoly v. Gayle*, 116.
8. *Same.*—Allowing a question to be asked, which was not answered, will not support an assignment of error.—*Ib.* 116.
9. *Same.*—It rests within the sound discretion of the court, to allow a party to introduce further evidence, even after the close of the argument; and the exercise of that discretion is not revisable.—*Carter v. Wilson*, 434.
10. *Same.*—As no appeal lies from the refusal of a change of venue, this court will not pass upon the sufficiency of the grounds for the ruling. *Wesley v. State*, 282.
11. *Same.*—The re-examination of a witness, at the instance of a party who has already introduced and examined him, that he may repeat his testimony, rests within the discretion of the primary court, and the exercise of that discretion is not revisable.—*Newbrick & Bros. v. Dugan*, 254.
12. *Same.*—If rulings upon demurrer do not appear, otherwise than by recitals in the bill of exceptions, they will not be revised on error.—*Carter v. Wilson*, 434.
13. *Error; when not cured or waived.*—There is no statute of this State applicable to criminal proceedings, which after judgment and verdict cures errors not previously objected to; on the contrary, our statute provides, on appeal or writ of error, that no assignment of error is necessary, but the court must render such judgment on the record as the law demands; and under the uniform practice of this court, whatever would have been good ground of motion in arrest of judgment in the court below, though not noticed there, will compel reversal here. *Finley v. State*, 201.
14. *Motion to dismiss appeal; when too late.*—A motion to dismiss an appeal can not be entertained, after submission of the cause on the merits, without notice to the appellant, and without affording him an opportunity of remedying the defect.—*Thornton v. Moore*, 348.
15. *What not ground of reversal.*—A judgment rendered by the City Court of Selma, the presiding judge determining both law and fact, as required when a jury is waived, will not be reversed, merely because of erroneous ruling on demurrer to defective counts of the complaint filed on appeal from a Justice's Court, if there is one good count, and the judgment is right on all the evidence, which is fully set out in the record.—*Meyer v. W. U. Tel. Co.* 159.
16. *Same.*—If upon the evidence admitted, and that rejected, excluding that to which a party objected, the court could properly have instructed the jury to find against him, and the jury does so find, he can not complain of erroneous rulings on the trial; for all presumption of injury is repelled, and error without injury is not ground for reversal.—*Lea v. Cassen*, 312.
17. *Same.*—A correct judgment will not be reversed, even though a wrong reason may be given for it, *e. g.*, as where the court orders pleas in

ERROR AND APPEAL—*Continued.*

abatement to be stricken from the file, because not filed in time, and the affidavit and writ of attachment plainly show the falsity of the pleas.—*Mitchell v. Pitts & Henry*, 219.

18. *Same.*—Where the case is such that in no event can the plaintiff recover, erroneous rulings against him, furnish no ground for reversal. *Alexander v. Coldwell*, 543.
19. *Same.*—A party can not complain of a charge which favors him, even though it be erroneous.—*Moore, Waldman & Co. v. Parks*, 409.
20. *Same.*—A general exception to the entire charge of the court, enunciating separable and distinct propositions of law, will be unavailing, if any one of its separate propositions is correct.—*Snow v. Carr*, 363.
21. *Affirmed judgment; can not be corrected or altered by lower court.*—A judgment of the lower court affirmed on appeal, is merged in the judgment of this court, and can not be altered by the lower court; nor by this court, after the expiration of the term at which it was rendered.—*McArthur v. Done*, 539.
22. *Supersedeas; when appeal will not operate.*—Under our statutes, an appeal will not suspend execution of the judgment or decree appealed from, unless bond and security be given for that purpose, as specified by the statutes.—*Gas Co. v. Merrick & Sons*, 534.
23. *Jurisdiction over insolvent estate; what essential to support on direct attack.*—The jurisdiction of the Court of Probate over an estate as insolvent, can not be sustained on error, unless the report and decree of insolvency appear of record; the existence of these facts can not be presumed from recitals in the orders of the court.—*Thornton v. Moore*, 348.

ESTATES OF DECEDENTS.

1. *Claims against insolvent estate; statutes concerning filing of, construed.* The purpose and object of the statute requiring the filing of claims against an insolvent estate, are complied with, when a statement of a claim is filed, which, when taken in connection with the affidavit accompanying it, fairly discloses an existing liability preferred against the estate.—*Thornton v. Moore*, 347.
2. *Same; statutes relating to, construed.*—The administrator of a creditor filed as a claim against an insolvent estate, an attorney's receipt for promissory notes made by the insolvent intestate, which described with particularity, the date, makers and payee, the amount and time of payment of each note, and that each bears interest from date. Appended to this receipt, was the affidavit of administrator, that he believes of his own personal knowledge, that the annexed receipt for claims or notes therein described, for $2008 and interest, to be counted in favor of "the estate" of which affiant was administrator, against the insolvent estate, "is correct, and that the same is justly due and unpaid,"—*held:* This was a substantial compliance with the statute; the affidavit, fairly interpreted, showing that the claim filed was for the notes, and not upon the receipts, in which they were described.—*Ib.* 347.
3. *Defenses, what can not be made, if not presented within twelve months.* Where no objection to the merits of a claim, duly filed against an insolvent estate, is made within twelve months after the declaration of insolvency, all defenses existing or occurring within that period, are barred; but matters subsequently occurring, which are a valid bar to the demand, or which deprive the creditor, in equity and good conscience, of all right to share in the fund, may be made available at any time before rendition of final decree, declaring the amount of the claim and the rateable proportion of assets to which the claimant is entitled.—*Ib.* 347.
4. *Same; mode of objection.*—The proper mode of objecting to a plea, filed more than twelve months after the declaration of insolvency,

ESTATES OF DECEDENTS—*Continued.*

seeking to make available against a claim matters of defense arising within that time, is a motion to strike from the files.—*Ib.* 347.

5. *Defective verification; when amendable.*—An insufficient verification to a claim, filed within the proper time, against an insolvent estate, is amendable at any time before final decree.—*Ib.* 347.
6. *Objection to claim against estate; when must be filed.*—The allowance of a claim duly filed against an insolvent estate, is matter of right, unless objections to its merits be filed within twelve months after the declaration of insolvency; and all matters of defense existing within that period and not duly filed, are forever barred.—*Herbert v. Thames*, 340.
7. *Same.*—Matters subsequently occurring, which are a valid bar to the demand, or which deprive the creditor of all right, in equity and good conscience, to share in the distribution, may be shown at any time before final decree declaring the amount of the claim, and the rateable proportion of assets to which the claimant is entitled.—*Ib.* 340.
3. *Claim of wife against husband's estate for conversion of statutory estate; what not bar to assertion of.*—Where the husband bought lands with the wife's statutory estate, taking title to himself, and his administrator sells them and collects the proceeds, the wife's pursuit of the funds in his hands as trust money, and compelling their payment to her under decree in chancery, is not inconsistent with her right to hold the estate liable, and no bar to her demand for the balance due, after crediting the amount coerced from the administrator.—*Ib.* 340.
9. *Transferee; when may appear in behalf of claim.*—Where a claim against an insolvent estate has been transferred, before objection filed to its allowance, the transferee may intervene and become the actor, when issues are formed as to its allowance. (*Overruling, in this respect, Miller v. Parker, 47 Ala. 312.*)—*Thornton v. Moore*, 348.
10. *Disqualification of presiding judge; to what extends.*—When the judge of probate is a creditor, having a claim filed against an insolvent estate, he becomes incompetent, not only as to that claim, but as to the entire administration; and whatever of judicial duty is to be performed in reference to it, must be performed by the register.—*Ib.* 384.
11. *Allegation of necessity for sale; what sufficient on collateral attack.* On collateral attack, a petition for sale of decedent's lands for division, &c., which describes the locality and situation of the lands, and avers that they would be unproductive, unless divided into lots and buildings erected thereon, which the estate has no means of paying for, and concludes: "*wherefore it is manifest, said lands can not be equitably divided between the heirs of said estate, unless by a sale of the same*," &c., is sufficient, in its allegations of the necessity for a sale, to give the court jurisdiction to order the sale.—*Bibb v. Bishop Cobbs Orphans Home*, 326.
12. *Necessity for sale, ascertainment of; what sufficient on collateral assault.*—An order of sale of lands descended to infants, reciting that "*K., commissioner heretofore appointed to take testimony in this cause, having reported the same, which by order of the court is approved and ordered to be filed among the papers of said estate; and the court proceeded to examine the testimony, and from said testimony it appears to the court that said lands can not be equitably divided among the heirs-at-law, without a sale thereof, and also that it would be more to the interest of the minors to sell said property and reinvest*," &c., contains enough to show that the necessity for sale was ascertained by proof of disinterested witnesses, taken by deposition as in chancery cases, when the order of sale is attacked collaterally.—*Ib.* 326.

ESTOPPEL.

1. *Purchaser at execution sale; when estopped from asserting invalidity of mortgage.*—One buying lands which the vendor had encumbered by

ESTOPPEL—*Continued.*

mortgage, to secure a debt to a third person, and expressly agreeing with the seller and the mortgagee to pay such debt, which is deducted from the cash payment required, subordinates his title to the mortgage, and is estopped from denying its validity; and the mortgage being duly recorded, a purchaser of the lands at a sale on execution against the vendee, merely succeeds to his rights, and is also bound by the estoppel.—*Kennedy v. Brown*, 296.

2. *Stockholder; when estopped to deny corporate existence.*—A subscriber to the capital stock of a bank incorporated by act of the legislature, (which makes the stock a fund pledged for the security of depositors,) upon condition that certain amendments shall be procured from the legislature, and who does not participate actively in an organization then made by the subscribers, with a view to the more easy attainment of the desired amendment, but after the failure to obtain it, pays up a portion of the subscription taking a receipt purporting to be the act of the bank, and signed by the cashier, for so much paid on the subscription, and makes no objection to the subsequent carrying on of business by the bank, though it was done with his knowledge, must be regarded as yielding assent to the provisions of the charter, and acquiescing in the organization, and can not withdraw such assent, to the prejudice of a depositor whose rights had already attached, nor to the prejudice of the corporation through whom the right may be enforced, after judgment, by garnishment; and besides, having dealt and contracted with the corporation as such, such subscriber is estopped to deny its corporate existence.—*Lehman, Durr & Co. v. Warner*, 455.

3. *Husband, when estopped from asserting invalidity of wife's mortgage of statutory estate.*—Where the wife, with the husband's concurrence, purchases and partly pays for land, and they procure a third person to advance the amount of the deferred payment, which is paid by the wife to the vendor, who conveys to her in terms creating a statutory estate, husband and wife promising at the time to execute a mortgage on such lands to secure the lender, and they afterwards execute a note and mortgage pursuant to the agreement, the instrument containing the statutory words "grant, bargain and sell," and also covenants to "warrant and defend the title" against the "lawful claims of all persons,"—such mortgage is void as to the wife, and can not prejudice her or her heirs; but its covenants estop the husband from denying its validity; and upon the wife's death intestate, the husband surviving, the mortgage will have the effect to pass his life-estate.—*Chapman v. Abraham*, 108.

4. *Estoppel from covenants, &c.*—Though a seal is not now essential to a conveyance of the legal estate in lands, the conveyance retains all the operation and effect of a sealed deed at common law, and the estoppel arising at common law out of the recitals or covenants of a sealed instrument, still attaches to the unsealed conveyance, executed according to the requirements of the statute.—*Jones v. Morris*, 518.

5. *Estoppel as to corporate existence.*—In general, whoever contracts with a corporation, in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the corporate existence, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or a right arising under it, is sought.—*Cahall & Pond v. Building and Loan Ass'n*, 232.

EVIDENCE.

ADMISSIBILITY AND RELEVANCY.

1. *Evidence; admissibility of.*—The identity of a horse, described in a mortgage as an "iron grey colt," being in issue, a witness testified that "he believed the horse [in defendnnt's possession] was the same ani-

EVIDENCE—*Continued.*

mal as that described in the mortgage, though he could not state of his own knowledge that it was the same; that the horse had no marks or distinct features whereby he could recognize him from any other grey horse, but he believed he was the same horse described in the mortgage, and was satisfied he was the same,"—*held:* not error to refuse to exclude such testimony, in the absence of proof, by cross-examination or otherwise, that the witness was ignorant of the matter about which he testified, or spoke merely at random.—*Turner v. McFee*, 468.

2. *Same.*—Where the grantor's creditors assail his conveyance for fraud, the fact that at the time of the sale, suits were pending against him, or that he apprehended suits, and other evidence of his general pecuniary condition, is admissible.—*Harrell v. Mitchell*, 271.
3. *Same.*—Entries upon the tax books, not made by the owner, or under his direction or authority, showing the assessed value of a mill, are not admissible for the purpose of refreshing his memory, as to who returned the property for taxation, or the amount at which it was assessed.—*Hudson v. State*, 324.
4. *Same.*—In a suit against a corporation for personal injuries, caused by falling into a ditch dug by it in the public highway, its liability depends wholly on its having caused or continued the nuisance, and the plaintiff's suffering the injury without fault on his part; and hence evidence of the care used in selecting a watchman to warn persons approaching the ditch, or his general character or reputation as a watchman, at the time of his employment, are immaterial, and properly excluded.—*S. & N. A. R. R. Co. v. Chappell*, 527.
5. *Same.*—Where part of the bill, in which complainant asserted facts to be different from what she afterwards alleged them to be, was allowed for the purpose of discrediting her testimony—other portions of the record not touching that question, and shedding no light on the issue, are irrelevant and properly excluded.—*Conoly v. Gayle*, 116.
6. *Same.*—Where the record of proceedings in another court is legitimate only to show a right to appear and defend the suit, and that has already been conceded, it is not error to rule out such record.—*Ib.* 116.
7. *Same.*—When the evidence does not show the authority of one professing to be agent of a creditor, for the collection of a claim, transactions between the debtor and such person, or statements by him, not known to the creditor, or afterwards ratified by him, are inadmissible against the creditor; and proof of efforts of the debtor to find such person, and to obtain his deposition, is irrelevant.—*Galbreath v. Cole*, 140.
8. *Same.*—A judgment against the executor on a cause of action against the testator, is no evidence of the existence of indebtedness as against the heir or devisee, on bill to subject lands devised or descended; but the rule is otherwise, where the devisee is executor, and the judgment is against him in his representative capacity; for on return of no goods of testator, execution could issue *de bonis propriis*.—*Boykin v. Cook*, 470.
9. *Same.*—Not only the cost of erecting a mill and placing machinery in it, but also their enhanced value by reason of location, other circumstances, and the general patronage and profits derived from it, may be considered in determining the value of the mill; and a person shown to be conversant with these matters, may give his opinion as to its value.—*Hudson v. State*, 334.
10. *Proof of execution of instrument; when proof of note contained therein.* Where an instrument is of the character of which registration is authorized and required, to preserve its validity as to *bona fide* purchasers, and at the top is a note or obligation creating the debt it is intended to secure, followed immediately by apt words of conveyance to secure such debt—proof of the execution and recording of the in-

EVIDENCE—*Continued.*

strument, necessarily includes proof of the note, and authorizes its admission without further proof of execution. — *Steiner v. McCall*, 413.

11. *Advances by landlord; what one claiming under, must prove as to.*—In trover by the mortgagee of tenants, against a defendant claiming crops by delivery from the landlord, whose title depended upon having made advances to the tenants, the defendant must make the same measure of proof as to the amount and value of the advances, as would be required of the landlord, if he were suing the tenants; mere proof that the landlord had made advances, without showing the amount or value, will not defeat the mortgagee's action.—*Ib.* 413.

BURDEN AND WEIGHT OF PROOF.

12. *Indicia of fraud; burden of proof.*—Where a *bona fide* creditor shows *indicia* or badges of fraud, the burden rests on the grantee to repel the presumptions they generate; if his ability to pay is questioned, he must show the source or means by which he obtained the money, and that there was a real adequate consideration, actually paid; and whatever there may be, not in the ordinary or usual course of such transaction, should be fully explained.—*Harrell v. Mitchell*, 270.

13. *Same.*—The fact that the son, shortly after receiving a conveyance of lands from an insolvent father, conveys parts of them to each of the other children, without any valuable consideration shown therefor, casts suspicion on the transaction, which can be removed only by clear and convincing evidence of fairness, good faith, and an actual consideration, really paid.—*Ib.* 270.

14. *Illegality of consideration; how must be proved.*—Illegality of consideration will not be inferred, when the evidence can reasonably and justly be reconciled with the hypothesis of legality, and he who asserts it, must prove it; but the evidence need not remove all reasonable doubt, as in criminal cases, but will be sufficient if it produces the degree of conviction essential in civil cases.— *Ware v. Jones*, 288.

ORDER OF INTRODUCTION.

15. *Lost instrument; rule as to proof of contents.*—As a general rule, where the loss of a written instrument is sought to be proved, its loss should be shown, before allowing evidence of its contents; but it rests in the sound discretion of the lower court to modify, or change, the rule in a particular case.—*Conoly v. Gayle*, 116.

16. *Order of introducing evidence, ruling as to; what not erroneous.*—Proponent was a witness. as to the loss of the will, and contestant, on cross-examination, exhibited a copy of a bill in chancery, filed and verified by her prior to that time, which she made affidavit to, knowing it averred that decedent died intestate. By agreement of counsel, it was expressly understood that this copy was to be read in evidence, but contestant declined to do this, until proponent closed her evidence; and thereupon the court, at proponent's instance, required the copy to be read then,—*held:* not error.—*Ib.* 116.

PAROL AND WRITTEN.

17. *Written contract; how can not be varied.*—The writings by which a contract is evidenced, in the absence of fraud or mistake in their execution, or any subsequent modification of the contract, are its sole expositors, and can no more be varied, contradicted, or explained by parol, in equity than at law.— *Winston v. Browning*, 80.

18. *Same; how explained by parol.*—A policy taken out by piano and music dealers, against loss by fire, describing the property as "*their own or held in trust,*" will, in the absence of evidence to the contrary, cover a piano left with them for sale or rent; but oral evidence is admissible

EVIDENCE—*Continued.*

to show what goods were intended to be, and were insured under the general words of the policy.—*Snow v. Carr*, 363.

PRESUMPTIONS.

19. *Administrator; additional bond of, liabilities of his sureties on.*—When shortly before the execution of an additional bond, an administrator reported a sale of the lands of the intestate, and that he had received the purchase-money, and thereon asking authority to make a conveyance, and the sale is confirmed, it not being shown that the money was disbursed before the execution of the additional bond, the presumption is, that the money remained in the hands of the administrator at the time of the execution of the additional bond, and the sureties thereon become responsible for its proper application.—*May v. Kelly*, 489.

PRIMARY AND SECONDARY.

20. *Same; what evidence admissible to show contents of.*—In action against the insured for money had and received, by one who claimed that his goods were covered by the policies of insurance, the amount of which the insured had collected, secondary evidence may be given of the contents and terms of the policies, where they have been cancelled, and returned to the insurer in a foreign country.—*Snow v. Carr*, 363.

See CRIMINAL LAW for questions of Evidence arising thereunder.

EXECUTION.

See COSTS, 4.
CHANCERY, 20.
EXECUTORS AND ADMINISTRATORS, 3.
GARNISHMENT, 3, 4.
JUDGMENT AND DECREE.

EXECUTORS AND ADMINISTRATORS.

1. *Judgment against personal representative; when not evidence against heir or devisee.*—A judgment against the executor on a cause of action against the testator, is no evidence of the existence of indebtedness as against the heir or devisee, on bill to subject lands devised or descended; but the rule is otherwise, where the devisee is executor, and the judgment is against him in his representative capacity; for on return of no goods of testator, execution could issue *de bonis propriis*. *Boykin, Ex'r, v. Cook, Adm'r*, 473.
2. *Judgment; what grossly irregular.*—Judgment to be levied *de bonis propriis*, in a suit against the executor as such, on a cause of action against the testator, is grossly irregular, and is properly amended *nunc pro tunc* at a subsequent term so as to make it *de bonis testatoris*; and the amendment when made will relate back to the date of the original judgment.—*Ib.* 472.
3. *Same; when void.*—A sale of the testator's lands, devised or descended, levied on and sold as his property, under execution so framed as to operate only on the executor personally, and issued on a judgment against him in his representative capacity, and a deed conveying such title as the defendant had *as executor* in the lands, are utterly inoperative and void.—*Ib.* 472.
4. *Administrator's bond; what necessary to maintain action on, by creditor of decedent.*—A creditor can not maintain an action at law on the bond of an administrator, until his debt or demand is first reduced to judgment or decree, by a court of competent jurisdiction; and such judgment, in the absence of fraud, is conclusive against the sureties, as to the existence of the debt.—*May v. Kelly*, 489.
5. *Administrator and sureties on bond; what chargeable with.*—An execu-

EXECUTORS AND ADMINISTRATORS—*Continued.*

tor or administrator and the sureties on the official bond, are chargeable with the rental value of lands of the estate, which he failed to rent, when he could have done so.—*Ib.* 489.

6. *Administrator; additional bond of, liability of sureties on.*—Where shortly before the execution of an additional bond, an administrator reported a sale of the lands of the intestate, and that he had received the purchase-money, and therein asking authority to make a conveyance, and the sale is confirmed, it not being shown that the money was disbursed before the execution of the additional bond, the presumption is, that the money remained in the hands of the administrator at the time of the execution of the additional bond, and the sureties thereon become responsible for its proper application.—*Ib.* 489.
7. *When not barred of vendor's lien.*—Whether or not an administrator, who became a creditor of decedent in his life-time, need or can present a claim against the estate, is not decided; but the failure of a vendor of land, who afterwards becomes administrator of the vendee, to bring the debt for the purchase-money into the administration account, or to file or present the same as a claim against the estate, will not bar his right to enforce his vendor's lien in equity.—*Flinn v. Barber*, 530.

See CHANCERY, 8, 13.

EXEMPTIONS.

1. *Homestead exemption; what law governs.*—The right to a homestead exemption, in favor of the widow and minor children, as against a mortgage, must be determined by the laws in force at the time of its execution, and at the death of the husband.—*Garner v. Bond*, 84.
2. *Mortgage of homestead, in which wife does not join; how far void.*—A mortgage or other conveyance of the homestead, in which the wife does not join, is void only as to the homestead; if the instrument embraces lands of greater quantity or greater value than the homestead, as defined by the constitution and statutes, the excess in value, or of quantity, passes to the grantee.—*Ib.* 84.
3. *Homestead exemption of lot in city; what essential to.*—The constitution of 1868 exempted a homestead in a city, town or village, from liability to seizure on legal process, only where the lot and appurtenances did not exceed two thousand dollars in value; and the limitations as to quantity and value not existing, there was no exemption from payment of debts, and no constitutional restraint as to alienation.—*Ib.* 84.
4. *Same.*—If the homestead exceeded the limitation of value, and was incapable of division, so as to reduce it within the limitation, there was no authority, prior to the act of 1873, to allow an equivalent in money; and that act provides for such allowance only where the homestead is sold under legal process, during the life of the owner, or his personal representative sells after his death.—*Ib.* 84.
5. *Homestead exemption; what may be the subject of.*—The other conditions concurring, lands of the statutory separate estate of the wife, may be the subject of homestead exemption.—*Weiner v. Sterling*, 98.
6. *Same; how may be aliened.*—A conveyance of such land in the manner requisite to convey the wife's statutory estate, will pass title thereto, freed from the right of homestead exemption, though the lands constitute the homestead, and there is no separate examination of the wife, apart from the husband, as required by the act of April 3d, 1873.—*Ib.* 98.
7. *Constitutional and statutory provisions with reference to alienation of the homestead; to what, apply.*—The constitutional requirement, and statutes passed to carry it into effect, as to the alienation of the home-

EXEMPTIONS—*Continued.*

stead, apply to cases where the owner thereof is a married man, and do not effect a homestead in lands of the statutory estate of the wife, which husband and wife have conveyed in the manner requisite to pass her title to such lands.—*Ib.* 98.

8. *Waiver of exemption, plea as to; what not demurrable.*—Our statute (Code, § 2849,) contemplates that in suits on written instruments in which exemptions are waived, the fact of such waiver shall be averred, and gives the defendant, not controverting the existence of the debt, the right to limit his contestation to the fact of such waiver; and the statute giving the right, such a plea is not demurrable because it does not answer the whole declaration; the consequence of the plea if sustained, is not to deprive the plaintiff of judgment for his debt and cost, but only to prevent the insertion in the judgment of the recital of waiver which would authorize a levy on exempt property.—*Goetter, Weil & Co. v. Pickett*, 387.

9. *Waiver of exemptions; when failure to read instrument will not defeat.* One who can read and write, and had ample opportunity to read the whole of a note containing a waiver of exemptions, before he signed it, can not, in the absence of fraud or misrepresentation practiced on him, set up his own failure to read the note, in order to avoid its stipulations, or in support of a plea putting in issue the fact of the waiver of exemptions.—*Ib.* 387.

10. *Conveyance of husband's homestead; requisites of.*—Prior to the act of April 23d, 1873, the husband's conveyance of his homestead, joined in by the wife, and witnessed or acknowledged in the manner requisite to pass the wife's real estate, was sufficient; after the passage of that act, such conveyance would not pass the homestead, unless the requirements of the statute were substantially pursued.—*Cahall & Pond v. Building and Loan Ass'n*, 232.

11. *Same; defective acknowledgment and certificate to wife's assent, how may be cured.*—Where the wife's signature and assent to the conveyance of the homestead have been defectively acknowledged and certified, she may make a new acknowledgment, with the intent to cure the defect, and such acknowledgment, when properly made and certified, will relate back, rights of third persons not intervening, to the date of the original delivery of the conveyance, without any new delivery.—*Ib.* 232.

12. *Notary's certificate; how can not be impeached.*—A notary's certificate to such conveyance, in the form prescribed by statute, can not be impeached, without showing that the wife's signature was forged, or that she was subject to duress, or that fraud was practiced on her, with knowledge of the grantee.—*Ib.* 232.

13. *Homestead; wife's assent to alienation of; what sufficient.*—The constitutional requirement as to the alienation of the homestead, owned by a married man, is satisfied, if the wife gives her "voluntary signature and assent" to the husband's conveyance, though she is not named as a grantor therein, and does not in terms convey anything. *Dooley v. Villalonga*, 129.

14. *Same.*—Though the husband alone bargains, sells, and conveys, as grantor in a mortgage, yet if the power of sale therein proceeds from both husband and wife, and vests the mortgagee with full power to sell the lands on default of payment, &c., and the wife voluntarily signs and assents to the conveyance,—this is a compliance with the constitution, and will pass title to a homestead, owned by the husband.—*Ib.* 129.

FORGERY.

See CRIMINAL LAW.

FRAUD—FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyance; what admissible to show.*—Where the grantor's creditors assail his conveyance for fraud, the fact that at the time of the sale, suits were pending against him, or that he apprehended suits, and other evidence of his general pecuniary condition, is admissible. *Harrell v. Mitchell*, 270.
2. *Same; indicia of fraud, burden of proof.*—Where a *bona fide* creditor shows *indicia* or badges of fraud, the burden rests on the grantee to repel the presumptions they generate: if his ability to pay is questioned, he must show the source or means by which he obtained the money, and that there was a real adequate consideration, actually paid; and whatever there may be, not in the ordinary or usual course of such transaction, should be fully explained.—*Ib.* 270.
3. *Same.*—The fact that the son, shortly after receiving a conveyance of lands from an insolvent father, conveys parts of them to each of the other children, without any valuable consideration shown therefor, casts suspicion on the transaction, which can be removed only by clear and convincing evidence of fairness, good faith, and an actual consideration, really paid.—*Ib.* 270.
4. *Conveyance; what evidence justifies decree annulling for fraud.*—The relationship of father and son between grantor and grantee; the grantor's known insolvency and apprehension of threatened suits; the failure of the grantee to show with particularity when, where or how he obtained the means to pay the consideration; the fact that shortly after the conveyance the grantee, without any valuable consideration shown, conveyed parts of the land to each of the other children; the failure to show what disposition the grantor made of the large consideration mentioned in the deed,—justify the court in holding the conveyance fraudulent as to existing creditors.—*Ib.* 270.
5. *Conveyance; what not fraudulent, and will not amount to a general assignment.*—An absolute sale and conveyance by a father, in failing circumstances, of substantially all his property to a son, without reserving any benefit to the grantor, upon the agreement that the price, which was the fair market value of the property, should be paid by the son directly to certain of the father's creditors, whose debts equalled the price for which the land was sold, and which debts the son paid,—can not be set aside as fraudulent, or declared a general assignment; though if the conveyance had not been absolute, but made to the grantee in trust for the payment of such debts, it would amount to a general assignment, under our statutes.—*Eskridge v. Abraham*, 134.
6. *Fraudulent conveyance; who can not assail.*—A conveyance to hinder, delay and defraud creditors, is voidable as to them, but valid as to the parties to it; and where by such a conveyance the husband, without intending any fraud on his future wife, divests himself of all estate and use in the lands, nothing is left out of which dower can be carved; and the future wife claiming through him at his death, can not dispute the validity of the conveyance, or have a court of equity engraft any use or trust on the lands, based on the husband's fraud, out of which to carve dower.—*King v. King*, 479.

GAMING.

See CRIMINAL LAW.

GARNISHMENT.

1. *Garnishee; how will be protected against double satisfaction.*—The garnishee being a mere stakeholder, standing in a relation of indifference between the plaintiff and defendant in the garnishment, will be protected against the jeopardy of double satisfaction, when sued by the defendant. The court states the mode in which this will be done. *Montgomery Gas Light Co. v. Merrick & Sons*, 534.

GARNISHMENT—*Continued.*

2. *Supersedeas; when appeal will not operate.*—Under our statutes, an appeal will not suspend execution of the judgment or decree appealed from, unless bond and security be given for that purpose, as specified by the statutes.—*Ib.* 534.
3. *Same.*—When the garnishment is dissolved, the plaintiff therein can not, by merely taking an appeal, giving security for costs only, and notifying the garnishee thereof, suspend the effect of such order, or prevent the defendant from obtaining and enforcing judgment for his demand against the garnishee.—*Ib.* 534.
4. *Same; what does not require court to stay order of execution against garnishee.*—The pendency of such an appeal from a decree dissolving the garnishment, does not require another court, in which the defendant is suing the garnishee, to stay proceedings against him, for his protection against double satisfaction; payment of the judgment will protect the garnishee from further liability, though the order or decree dissolving the garnishment be afterwards reversed.—*Ib.* 534.

GIFT.

See HUSBAND AND WIFE, 2.

GUARDIAN AND WARD.

1. *Guardianship; what not bar to bill for settlement of.*—An annual settlement passing and allowing the guardian's accounts, and ascertaining the balance due the ward, is not a bar to a bill filed by the ward after attaining majority, to compel a settlement of the guardianship. *May v. Duke*, 53.
2. *Guardian and sureties; of what can not take advantage.*—Neither the guardian, nor his sureties, can avoid a partial or final settlement of the guardianship, because the ward was not represented by guardian *ad litem*; but the ward may.—*Ib.* 53.
3. *Conversion; what amounts to.*—A loan of the ward's money upon no other security than the note of the borrower, no matter how undoubted his solvency and credit, is unauthorized; and the ward may elect to treat it as a conversion, or ratify it as proper administration; and in the latter event only does it become assets of the ward's estate.—*Ib.*
4. *Same.*—If the ward does not ratify an unauthorized loan, neither purity of intention in making it, nor diligence and good faith in endeavoring to prevent loss thereby, will absolve the guardian from liability.—*Ib.*
5. *Guardian; for what entitled to credits.*—A guardian is entitled to credit only for moneys actually expended, or necessaries furnished the ward; the *onus* being on the guardian to support his claim for credits, by evidence of a character which would support his action, if he were suing the ward in an action *ex contractu*.—*Ib.* 53.

HOMESTEAD.

See EXEMPTIONS.

HOMICIDE.

See CRIMINAL LAW, 18.

HUSBAND AND WIFE.

1. *Equitable estate; what creates.*—A legacy to a married woman under the provisions of her father's will, directing that the amount "shall go into the hands of a trustee for her use and behoof, and no other," manifests a clear intention to vest in her an equitable estate; and where the trustee purchases lands, it is his duty to take a conveyance on the same trusts; and he having done so, a marriage settlement entered into by the wife, after the husband's death, upon the eve of a second marriage, can not alter her estate as to such lands, whatever

HUSBAND AND WIFE—*Continued.*

effect it might have on after acquired property; and the wife may bind such estate by her contracts, notwithstanding her coverture and the terms of the marriage settlement.—*Sprague v. Shields*, 428.

2. *Equitable separate estate; what creates.*—A gift by the husband to the wife, of property, real or personal, creates in the wife an equitable separate estate, and property thus acquired is not within the operation of statutory or constitutional provisions which create the separate estate.—*Helmetag v. Frank*, 67.
3. *Same; incidents of.*—An incident of an equitable separate estate is the power of the wife to alienate or charge it, as if she were a *femme sole*, unless restrained by the instrument creating it. She may mortgage it as security for her own debt, or that of the husband.—*Ib.* 67.
4. *Statutory estate of married woman; power to convey.*—The wife's capacity to convey her statutory estate is no greater in equity, than at law; and by the uniform decisions of this court she can not mortgage it, whether alone or jointly with her husband; and if she attempts to do so, no title passes thereby.—*Lehman, Durr & Co. v. Garrett*, 391.
5. *Mortgage of statutory estate of wife, how far void; when husband by joining in, will convey his life-estate on wife's death intestate.*—Where the wife, with the husband's concurrence, purchases and partly pays for land, and they procure a third person to advance the amount of the deferred payment, which is paid by the wife to the vendor, who conveys to her in terms creating a statutory estate, husband and wife promising at the time to execute a mortgage on such lands to secure the lender, and they afterwards execute a note and mortgage pursuant to the agreement, the instrument containing the statutory words "grant, bargain and sell," and also covenants to "warrant and defend the title" against the "lawful claims of all persons,"—such mortgage is void as to the wife, and can not prejudice her or her heirs; but its covenants estop the husband from denying its validity; and upon the wife's death intestate, the husband surviving, the mortgage will have the effect to pass his life-estate.—*Chapman v. Abraham*, 108.
6. *Liability of wife's statutory estate for necessaries; effect of admissions by husband.*—Acts or admissions of the husband will not prevent or remove the bar of the statute of limitations, as to the remedy against the statutory estate of the wife, for articles of comfort and support of the household.—*Lee v. Campbell*, 12.
7. *Same; what are necessaries, in the meaning of the statute.*—Under the statute in force in the year 1863, the statutory estate of the wife was not liable except for food, raiment, habitation, medical assistance, and medicine,—necessaries for which the husband would be responsible at common law, though supplied without his knowledge or consent.—*Ib.* 12.
8. *Same.*—A smoke-house, carriage-house, and fencing, are not necessaries within the meaning of the statute.—*Ib.* 12.
9. *Legal title to personalty taken by husband in payment of debts due the wife; in whom vests.*—The husband has authority to accept property in payment of debts due the statutory estate of the wife; and if he does so, intending the transaction for the wife's benefit, without taking title to himself, though without expressly taking title to the wife, the legal title to the property, if it be personal, of necessity vests in the wife, and the husband's mortgage can not divest it.—*Evans v. English*, 416.
10. *Legal title to property acquired by husband's exchange of wife's property, where statutory mode of conveyance is not followed; in whom vests.*—Our statutes prescribe the only mode in which the statutory estate of the wife may be conveyed; and if the husband exchanges a portion of the wife's statutory estate for other property, the wife's property not having been conveyed in the statutory mode, the legal

HUSBAND AND WIFE—*Continued.*

title to the property acquired by the exchange vests in the husband, and his mortgagee, under circumstances constituting a *bona fide* purchaser for value, without notice, is entitled to protection against the wife's equities to the exchanged property.—*Ib.* 416.

11. *Husband and wife; what not contract between, within prohibition of statute.*—A receipt given by the husband to his wife, acknowledging that he had received from her a certain amount of money, for investment, with a like amount of his own, in certain exchange which he purchased, and that the wife was entitled to one-half of the proceeds when sold,—is not a contract between husband and wife, within the meaning of the statute forbidding their contracting with each other. *Haynie v. Miller*, 62.

12. *Same; burden of proof.*—The husband's receipt is an admission that the money rightfully belonged to the wife, and *prima facie* entitles her to a recovery; if her right to the money is denied, it must be disproved by those who controvert it.—*Ib.* 62.

See EXEMPTIONS, 1, 2, 10, 11, 12, 13, 14.
DOWER.

INDICTMENT.

See CRIMINAL LAW.

INSURANCE.

1. *Contract of insurance; requisites of.*—In the absence of statutory prohibition, a contract of insurance may be made by parol, or there may be a parol agreement to insure, which a court of equity will enforce; but whether made by parol or writing, as in all other contracts, the mutual assent of the parties to all the elements and terms of the contract, is essential to its existence.—*Ala. Gold Life Insurance Co. v. Mayes*, 163.

2. *Same; what does not constitute.*—B obtained from the agent of an insurance company,—who claimed to exercise no other power than to receive B's application of life insurance, the percentage of the premium and the fees for the policy, and note for the remainder of the premium, and forward the same for the rejection or acceptance of the insurance company—a written instrument or receipt, reciting that B had made application for a policy of insurance on his life, for a given sum: the payment of a certain part of the first annual premium, &c., and B's note for the remainder. This instrument further states, that "B was to be considered insured from the date of the receipt, *if said application shall be approved and accepted by said company*, in which case a policy shall be issued to him, and this receipt surrendered; but if said application shall be rejected, then the amount named and the note given, shall be returned to B, and this receipt shall become null and void." This application was duly forwarded to the Insurance Company, which after a delay of several weeks, rejected the application, but did not give up the cash payment or note, no demand having been made for their return. B was taken sick about this time, and died a few weeks afterwards without being informed of the rejection of his application, and his administrator brought suit upon the receipt, as on a contract of insurance,—*held:*

1. The transaction constituted merely a proposal from B to the agent for a contract, the unqualified right of acceptance or rejection being reserved to the principal, and the proposal could not ripen into a contract, until accepted by the principal.

2. Mere delay of the Insurance Company in accepting the offer or proposal, and in returning the cash premium, for which demand was not made, did not amount to an acceptance of the proposal, and convert it into a contract.

INSURANCE—*Continued.*

3. The Insurance Company had the right to decline acceptance of the proposal without assigning any cause, no contract being made by the agent, who claimed no power to make any contract; and herein this case differs from those where an agent having authority to make contracts of insurance, makes one subject to approval of his principal,—as to which it is held the principal can not withhold his approval, without sufficient cause.

4. The transaction until the proposal of B for life insurance was rejected was merely preparatory to or initiatory of a contract, and was terminated absolutely by the rejection of the proposal; no other duty remaining afterwards on the Insurance Company than to return, on demand, the cash paid by B, and the note given by him.—*Ib.* 163.

3. *Same; policy of, construed.*—A policy taken out by piano and music dealers, against loss by fire, describing the property as "*their own or held in trust,*" will, in the absence of evidence to the contrary, cover a piano left with them for sale or rent; but oral evidence is admissible to show what goods were intended to be, and were insured under the general words of the policy.—*Snow v. Carr*, 363.

4. *Same; what evidence admissible to show contents of.*—In action against the insured for money had and received, by one who claimed that his goods were covered by the policies of insurance, the amount of which the insured had collected, secondary evidence may be given of the contents and terms of the policies, where they have been cancelled, and returned to the insurer in a foreign country.—*Ib.* 363.

5. *Insurance money, right to share in; what does not forfeit.*—One who effected insurance covering his own and other goods stored with him, and collected the amount of the policy on the happening of the loss, can not defeat an action by the owner of such goods for his share of the insurance money, because such owner never requested any insurance and did not know that it was taken out until after the loss, and failed to ratify expressly, or otherwise, the acts of the warehouseman in taking out the policy, before the payment of the loss.—*Ib.* 363.

6. *Same.*—In such case the insured holds the amount collected as trustee for the owner of such goods as well as those held in his own right, and the failure to make proof of loss of the goods of other persons, the value of his own goods being more than the amount of the policy, which he collected in full, will not prejudice the rights of such persons; nor can he claim to have the loss of his own goods first made good out of the fund received, before owners of the other goods can share therein.—*Ib.* 363.

INSPECTION OF RECORDS.

See AUDITOR, 1, 2.

INTEREST.

See USURY.

JEOPARDY.

See CRIMINAL LAW.

JUDGMENT AND DECREE.

1. *Judgment; when not evidence.*—A judgment against the executor on a cause of action against the testator, is no evidence of the existence of indebtedness as against the heir or devisee, on bill to subject lands devised or descended; but the rule is otherwise, where the devisee is executor, and the judgment is against him in his representative capacity; for on return of no goods of testator, execution could issue *de bonis propriis.*—*Boykin, Ex'r, v. Cook, Adm'r*, 473.

2. *Judgment; what grossly irregular.*—Judgment to be levied *de bonis*

JUDGMENT AND DECREE—*Continued.*

propriis, in a suit against the executor as such, on a cause of action against the testator, is grossly irregular, and is properly amended *nunc pro tunc* at a subsequent term so as to make it *de bonis testatoris*; and the amendment when made will relate back to the date of the original judgment.—*Ib.* 472.

3. *Same; when void.*—A sale of the testator's lands, devised or descended, levied on and sold as his property, under execution so framed as to operate only on the executor personally, and issued on a judgment against him in his representative capacity, and a deed conveying such title as the defendant had *as executor* in the lands, are utterly inoperative and void.—*Ib.* 472.
4. *Judicial sale; when not affected by reversal of decree under which it is made.*—The title of a stranger purchasing lands at judicial sale under an erroneous judgment or decree, will not be defeated or impaired by a subsequent reversal of the decree.—*Marks v. Cowles*, 299.
5. *Same; when reversal defeats.*—Where a party to the decree purchases under an erroneous judgment or decree in his own favor, he acquires a defeasible title only, which fails upon a subsequent reversal of such judgment or decree.—*Ib.* 299.
6. *Same.*—The assignee of one who purchased under an erroneous decree in his own favor, stands in the shoes of his vendor, and a subsequent reversal defeats his title also; and the judgment or decree being the foundation of the title, the assignee or vendee of such purchaser is bound to take notice of it, and therefore not entitled to protection as a *bona fide* purchaser, for value without notice.—*Ib.* 299.
7. *Purchaser at judicial sale; when not bound by.*—In general a purchaser at judicial sale is bound, though he takes nothing thereby; but the rule is subject to the exception that no one will be bound, if the sale is absolutely void.—*Boykin v. Cook*, 472.
8. *Same.*—The plaintiff in a judgment against the executors, in their representative capacity, who causes execution issued thereon and operating only against them personally, to be levied on lands of the testator, devised or descended, and sold as such, bidding the full amount of his judgment, and receiving a conveyance of all the interest the executors had as such in the lands—does not thereby satisfy the debt, the sale and conveyance being void, and he not actually realizing anything at the sale.—*Ib.* 472.
9. *Submission for decision in vacation; construed.*—A bill of exceptions was reserved to the ruling of the probate judge on a contest of the election for county solicitor, and an appeal taken from this judgment to the Circuit Court, where the cause was submitted, by consent, to the circuit judge for decision in vacation, with the stipulation that the decision "*be made in eight weeks and entered up as of the present term*,"—*held*: The terms of the submission were satisfied, if the judge reduced his decision and judgment to writing, within the prescribed period, so that it could be entered of record at a future day; and the judgment was valid, though not filed with the clerk and entered of record until the succeeding term, and after the expiration of the judge's official term.—*Hamil v. Gibson*, 261.
10. *Correction of judgment, nunc pro tunc.*—Our statute of amendments does not apply to criminal cases; but the inherent common law power of the courts to correct clerical misprisions, where its records furnish proper basis therefor, extends to criminal as well as civil cases. It is the duty of the clerk to tax costs and make a memorandum thereof, and such memorandum, when made during the term, become a *quasi* record, which authorizes the correction *nunc pro tunc*, at a succeeding term, of a judgment rendered at a former term, which left blank the number of days hard labor to which the defendant was sentenced. *Ex parte Jones*, 399.

JUDGMENT AND DECREE—*Continued.*

11. *Execution on decree in chancery; when erroneous.*—A decree in a foreclosure suit, on bill to enforce a vendor's lien, ascertaining the amount of indebtedness, has the force and effect of a judgment; but execution can not issue until after sale and confirmation and decree ascertaining the balance due.—*Winston v. Browning*, 80.
12. *City Court of Selma, judgment of; when will not be reversed for erroneous ruling on demurrer.*—A judgment rendered by the City Court of Selma, the presiding judge determining both law and fact, as required when a jury is waived, will not be reversed, merely because of erroneous rulings on demurrer to defective counts of the complaint filed on appeal from a Justice's Court, if there is one good count, and the judgment is right on all the evidence, which is fully set out in the record.—*Meyer v. W. U. Tel. Co.* 159.
13. *Affirmed judgment; can not be corrected or altered by lower court.*—A judgment of the lower court affirmed on appeal, is merged in the judgment of this court, and can not be altered by the lower court; nor by this court, after the expiration of the term at which it was rendered.—*McArthur v. Dane*, 539.
14. *Damages against sheriff for failure to pay over money; what motion sufficient to support judgment for.*—The statute prescribes the damages recoverable of a sheriff in a summary proceeding for failure to pay over money collected on execution; and if the motion sets forth the facts with sufficient certainty, it is in effect a motion for damages also, and will support a judgment awarding them.—*Ib.* 539.
15. *Redemption; confessed judgment, not available to defeat.*—Our statutes prohibit the use of a confessed judgment to a purchaser, who is resisting redemption of the debtor's property sold under judicial process, as well as to a creditor who is seeking to redeem it.—*M. M. Ins. Co. v. Steele*, 253.

JUDGE.

See CONSTITUTIONAL LAW, 8, 9.

JUROR AND JURY.

See CRIMINAL LAW.

JUSTICE OF THE PEACE.

1. *Writ of seizure; when justice may issue.*—A justice of the peace, after exacting proper affidavit and bond in a *detinue* suit, has jurisdiction, dependent upon the value of the property, to issue a writ of seizure. *Jacobs v. State*, 448.
2. *Appeals from justice's court; how tried.*—Appeals from justice's judgments are to be tried on appeal according to equity and justice, and the declaration filed on appeal, is not subject to technical rules of pleading, and is sufficient if it shows in general terms a debt due, or a contract to be performed, and a breach thereof.—*W. U. Tel. Co. v. Meyer*, 159.

LANDLORD AND TENANT.

1. *Landlord and tenant; what creates relation of.*—An agreement between two tenants in common, whereby one occupies and cultivates the joint estate, contracting to pay the other a stipulated rent for his portion, creates the relation of landlord and tenant between them, with its usual rights and incidents.—*Evans v. English*, 416.
2. *Landlord's lien for advances; what necessary under act of March 8th, 1871.*—The statute of March 8th, 1871, (prior to its amendment, § 2467 of Code) giving the landlord a lien for advances, &c., required that the advances should be made by the landlord himself, and for the purpose of aiding in the cultivation of the rented lands for the cur-

LANDLORD AND TENANT—*Continued.*

rent year; if the advances were not thus made, and for the specified purpose, the statutory lien did not attach as to such particular items—*e. g.*—as where the landlord forbore to collect his rent for a previous year, and re-rented for another year, under an agreement that the amount of back rent should be an advance for the current year.—*Ib.*

3. *Advances by landlord; what one claiming under, must prove as to.*—In trover by the mortgagee of tenants, against a defendant claiming crops by delivery from the landlord, whose title depended upon having made advances to the tenants, the defendant must make the same measure of proof as to the amount and value of the advances, as would be required of the landlord, if he were suing the tenants; mere proof that the landlord had made advances, without showing the amount or value, will not defeat the mortgagee's action.—*Steiner & Bro. v. McCall*, 413.

See ADVANCES.

LEGACY.

See WILLS.

LEGISLATURE.

See CONSTITUTIONAL LAW, 1, 7.

LIEN.

See ADVANCES, 1, 5.
LANDLORD AND TENANT, 6.
VENDOR AND PURCHASER.

LIMITATIONS—STATUTE OF.

1. *Vendor's lien; what not bar to enforcement of.*—In the absence of any agreement to the contrary, the vendor retains a lien on lands for the unpaid purchase-money, though he has made an absolute conveyance in fee to the vendee, and put him in possession; and the fact that the debt, as a mere legal demand, is barred by the statute of limitations, is no bar to the enforcement of the lien in equity.—*Flinn v. Barber*, 530.

See EJECTMENT.
PLEADING AND PRACTICE, 3, 4.

LOTTERY.

1. *"Tuskaloosa Scientific and Art Association," charter of; does not authorize lottery.*—The charter of the "Tuskaloosa Scientific and Art Association," &c., approved February 3d, 1866, construed, and the conclusion declared that it does not authorize a lottery on the numerical or combination plan; or on any other plan where money or its equivalent is offered or distributed as premiums.—*Boyd v. State*, 177.

MANDAMUS.

1. *Mandamus; when will not lie to compel Auditor to correct a restatement of account.*—The Auditor in settling a public official's account for one year, has no authority to re-state an account settled and certified by his predecesssor in a former year, embracing in the last account items which should have been included in the former, and then by certifying such re-stated account, make it presumptive or *prima facie* evidence of its correctness; but where it is not averred that the Auditor has certified, or will attempt to certify, as correct, items brought forward from the settlement had in a former fiscal year with his predecessor, or that suit has been brought or threatened to be brought, such alteration of the account works no harm to the officer; and having an ample remedy in defense of suit, if brought, he is not

MANDAMUS—*Continued.*

entitled to *mandamus* to compel the Auditor to strike out such disputed items.—*State ex rel. v. Brewer*, 318.

2. *Same; when lies to compel inspection of public record.*—Where the party has no interest, or the disclosure sought would be detrimental to the public interests, inspection of the records of an executive department of the government may be denied. Public interests are not endangered, by allowing a tax-collector, or his attorney, to inspect the collector's account with the State, as kept in the Auditor's office; and if such inspection is requested, and the Auditor denies it, *mandamus* lies against him.—*Brewer v. Watson*, 310.

3. *Mandamus; when does not lie.*—*Mandamus* is not the proper remedy, to compel a court or magistrate to discharge a person, alleged to be improperly detained under process issued by such court or magistrate.—*Ex parte Graves*, 381.

MASTER AND SERVANT.

1. *Corporation; what duty owes employes, in selection of fellow servants.* A railroad corporation owes a duty to its employés, to exercise due care and diligence in the selection and appointment of their fellow-servants, and is answerable for injuries resulting from its want of care or skill, in these respects; though if these have been observed, it is not responsible to one servant, for injuries resulting from the negligence of his fellow-servant.—*Tyson v. S. & N. A. R. R. Co.* 554.

2. *Same; delegation of power of appointment, effect of.*—Whoever exercises the power of appointing and removing employes or servants, though his grade of employment as to other matters, makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employes, are the negligence or mistakes of the corporation, for which it must answer.—*Ib.* 554.

MORTGAGE.

1. *Mortgage; what sufficient consideration for.*—One's own debt, though past due, is always a sufficient consideration to support his mortgage to the creditor to secure the debt; and as to parties and privies is as effectual, as if made upon an adequate new consideration.—*Turner v. McFee*, 468.

2. *Mortgage; registration of; what will not avoid effect of.*—A mortgage duly filed for record and recorded, will not lose the privileges conferred by the registration statutes, because of the failure of the probate judge to properly note it in the index, which the law requires him to keep.—*Ib.* 468.

3. *Mortgage to secure antecedent or subsequent debt; validity of.*—As between mortgagor and mortgagee and their privies, a mortgage to secure an antecedent debt, or a debt subsequently to be contracted, is perfectly valid, whatever may be its effect as to subsequent purchasers or incumbrancers.—*Steiner v. McCall*, 406.

4. *Invalidity of mortgage of lands; purchaser at execution sale, when estopped from asserting.*—One buying lands which the vendor had encumbered by mortgage, to secure a debt to a third person, and expressly agreeing with the seller and the mortgagee to pay such debt, which is deducted from the cash payment required, subordinates his title to the mortgage, and is estopped from denying its validity; and the mortgage being duly recorded, a purchaser of the lands at a sale on execution against the vendee, merely succeeds to his rights, and is also bound by the estoppel.—*Kennedy v. Brown*, 296.

5. *Attorney's fees; when may be included in mortgage.*—A stipulation in the mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee attorney's fees incurred in collecting the debt,

MORTGAGE—*Continued.*

will not render the agreement usurious; but a reasonable amount only can be collected, though a larger sum or per cent. is agreed on. *Munter & Faber v. Linn*, 492.

6. *Mortgage of homestead, in which wife does not join; how far void.*—A mortgage or other conveyance of the homestead, in which the wife does not join, is void only as to the homestead; if the instrument embraces lands of greater quantity or greater value than the homestead, as defined by the constitution and statutes, the excess in value, or of quantity, passes to the grantee.—*Garner v. Bond*, 84.

7. *Mortgage of statutory estate of wife, how far void; when husband by joining in, will convey his life-estate on wife's death intestate.*—Where the wife, with the husband's concurrence, purchases and partly pays for land, and they procure a third person to advance the amount of the deferred payment, which is paid by the wife to the vendor, who conveys to her in terms creating a statutory estate, husband and wife promising at the time to execute a mortgage on such lands to secure the lender, and they afterwards execute a note and mortgage pursuant to the agreement, the instrument containing the statutory words "grant, bargain and sell," and also covenants to "warrant and defend the title" against the "lawful claims of all persons,"—such mortgage is void as to the wife, and can not prejudice her or her heirs; but its covenants estop the husband from denying its validity; and upon the wife's death intestate, the husband surviving, the mortgage will have the effect to pass his life-estate.—*Chapman v. Abraham*, 108.

8. *Equitable estate; incidents of.*—An incident of an equitable separate estate is the power of the wife to alien or charge it, as if she were a *femme sole*, unless restrained by the instrument creating it. She may mortgage it as security for her own debt, or that of the husband. *Helmetag v. Frank*, 67.

9. *Statutory estate of married woman; power to convey.*—The wife's capacity to convey her statutory estate is no greater in equity, than at law; and by the uniform decisions of this court she can not mortgage it, whether alone or jointly with her husband; and if she attempts to do so, no title passes thereby.—*Lehman, Durr & Co. v. Garrett*, 391.

10. *Mortgage of homestead.*—Though the husband alone bargains, sells, and conveys, as grantor in a mortgage, yet if the power of sale therein proceeds from both husband and wife, and vests the mortgagee with full power to sell the lands in default of payment, &c. "and the wife voluntarily signs and assents" to the conveyance,—this is a compliance with the constitution, and will pass title to a homestead, owned by the husband.—*Dooley v. Villalonga*, 129.

11. *Mortgage, defective execution of; what cures.*—Though a mortgage as originally executed is invalid, yet if the mortgagor subsequently executes a power of sale of the lands conveyed by the mortgage, accurately identifying it and the debt secured, and authorizing a sale for the purpose of paying such debt,—this cures the invalidity of the mortgage.—*Alexander v. Caldwell*, 543.

12. *Bill to enjoin sale under mortgage; when demurrable.*—A mortgagor seeking to enjoin a sale, under a power in the mortgage, on the ground of usury, must either bring the money and lawful interest into court, or must by his offer submit himself to the jurisdiction of the court, that it may do complete equity between the parties; otherwise his bill is demurrable.—*Eslava v. Crampton*, 507.

13. *Same.*—Where the bill contains such offer, a decree of foreclosure may be made without any cross-bill; and a cross-bill being unnecessary, it is immaterial whether a cross-bill was formal, or had been properly put at issue.—*Ib.* 507.

NEGLIGENCE.

1. *Contributory negligence; doctrine of discussed.*—The doctrine that one who has contributed proximately to the injury can not recover damages therefor, is now too firmly rooted in our jurisprudence to be open to further controversy; it rests not on the idea that one wrong sets off the other, or that one justifies the other, but on the broader ground, that when the negligence of the plaintiff has contributed proximately to the injury, the damage is considered of his own causing, and it is difficult, if not impossible, to determine the *quantum* of injury which resulted from that defendant's tortious or negligent conduct.—*M. & C. R. R. Co. v. Copeland*, 376.
2. *Negligence; what fixes charge of, on railroad company.*—The failure to ring the bell or blow the whistle on the starting of the train, as required by the statute, fixes the charge of negligence on a railroad company; and any one injured thereby may recover damages for the injury, unless his own negligence or fault has disabled him from making complaint.—*Ib.* 376.
3. *Contributory negligence; what will defeat recovery.*—Plaintiff's intestate got off a passenger train of defendant, which had just arrived in a small incorporated town, and attempted to crawl between two cars of a freight train standing on a side track, with locomotive attached and steam up, ready to start, which stood between him and the depot. Those in charge of the freight train did not see him, and backed it without giving proper signals, just as he got between the cars,—*held:* The conduct of the deceased can not be classed less than negligence, bordering on recklessness, and contributed proximately to his death, and his personal representative can not recover, though defendant was negligent in not giving proper signals before its train started—the injury not having been inflicted wantonly or intentionally.—*Ib.* 376.

See MASTER AND SERVANT, 1, 2.

NEW TRIAL.

1. *New trial.*—The Supreme Court has no power to grant a new trial. *Rash v. State*, 89.

NOTARY.

See DEEDS, 12.

NON-CLAIM, STATUTE OF.

4. *Claims against insolvent estate; statutes concerning filing of, construed.* The purpose and object of the statute requiring the filing of claims against an insolvent estate, are complied with, when a statement of a claim is filed, which, when taken in connection with the affidavit accompanying it, fairly discloses an existing liability preferred against the estate.—*Thornton v. Moore*, 347.
2. *Defenses, what can not be made, if not presented within twelve months.* Where no objection to the merits of a claim, duly filed against an insolvent estate, is made within twelve months after the declaration of insolvency, all defenses existing or occurring within that period, are barred; but matters subsequently occurring, which are a valid bar to the demand, or which deprive the creditor, in equity and good conscience, of all right to share in the fund, may be made available at any time before rendition of final decree, declaring the amount of the claim and the rateable proportion of assets to which the claimant is entitled.—*Ib.* 347.
3. *Same; mode of objection.*—The proper mode of objecting to a plea, filed more than twelve months after the declaration of insolvency, seeking to make available against a claim matters of defense arising within that time, is a motion to strike from the files.—*Ib.* 347.
4. *Defective verification; when amendable.*—An insufficient verification to

NON-CLAIM. STATUTE OF—*Continued.*

a claim, filed within the proper time, against an insolvent estate, is amendable at any time before final decree.—*Ib.* 347.

5. *Objection to claim against estate; when must be filed.*—The allowance of a claim duly filed against an insolvent estate, is matter of right, unless objections to its merits be filed within twelve months after the declaration of insolvency; and all matters of defense existing within that period and not duly filed, are forever barred.—*Herbert v. Thames*, 340.
6. *Same.*—Matters subsequently occurring, which are a valid bar to the demand, or which debar the creditor of all right, in equity and good conscience, to share in the distribution, may be shown at any time before final decree declaring the amount of the claim, and the rateable proportion of assets to which the claimant is entitled.—*Ib.* 340.
7. *When need not be presented.*—Whether or not an administrator, who became a creditor of decedent in his life-time, need or can present a claim against the estate, is not decided; but the failure of a vendor of land, who afterwards becomes administrator of the vendee, to bring the debt for the purchase-money into the administration account, or to file or present the same as a claim against the estate, will not bar his right to enforce his vendor's lien in equity.—*Flinn v. Barber*, 531.

OVERRULED CASES, AND HEREIN OF CASES CRITICISED AND RE-AFFIRMED.

1. *Overruled case.*—*Miller v. Parker*, 47 Ala. 312, overruled as rights of transferee of claim filed against insolvent estate.—*Thornton v. Moore*, 348.
2. *Same.*—*Williams v. Sims*, 22 Ala. 512, overruled as to what sufficient consideration to support promise.—*Underwood v. Lovelace*, 155.
3. *Case explained.*—When this case was here at a former term (see *Dane v. McArthur*, 57 Ala. 448), on appeal from a judgment against Dane and his sureties, this court was compelled to correct a clerical error, and to amend the judgment so as to operate against Dane alone; and having to correct this error before the judgment could be affirmed, could not, and did not, award damages on affirmance; the judgment of the Circuit Court against Dane was not disturbed, nor was it decided that its judgment for damages was erroneous.—*McArthur v. Dane*, 539.
4. *Case distinguished.*—The case of *Jonsen v. Nobrinq*, 50 Ala. 392, distinguished from this.—*Alexander v. Caldwell*, 543.
5. *Case adhered to.*—The court adheres to its decision in *State, ex rel. Harrell, v. Mobile and Montgomery Railway Company*, 59 Ala. 325, that the second section of the act of April 19th, 1873, which provides that railroad companies "may for the transportation of local freight, demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight, over the whole line of its road,"—does not authorize the addition of fifty per cent. on the charge over the whole road, irrespective of the distance the freight may be carried, but only an additional fifty per cent. more per mile, for the distance local freight is carried, than the per mile rate charged on goods carried over the whole line.—*M. & M. R'y Co. v. Steiner, McGehee & Co.* 559.
6. *Cases cited and reaffirmed.*—The court reaffirms the principles decided in *Savannah and Memphis Railroad Co. v. Shearer*, 58 Ala. 672; *Tanner v. Louisville and Nashville Railroad Co.* 60 Ala. 621; *Mobile and Montgomery Railroad Co. v. Blakely*, 59 Ala. 471.—*M. & C. R. R. Co. v. Copeland*, 376.

PARTNERSHIP.

1. *Commercial partnership; what constitutes.*—A partnership in the business of buying cattle and slaughtering them for sale, and dealing in

PARTNERSHIP—*Continued.*

vegetables and like commodities, is a commercial partnership; each member of which has the right to draw, accept, or endorse bills of exchange in the firm name, and bind the partnership, as to third persons, dealing fairly and in good faith, as to matters usually incident to the business; and it is immaterial in such a case, as to a person thus dealing with one of the partners, that the other was not informed of the transaction, and repudiated it as soon as it came to his knowledge.—*Wagner v. Simmons & Co.* 143.

2. *Bill to establish partnership; when not maintainable.*—A bill will not be entertained to establish a partnership between two persons, settle its dealings, and declare one of them trustee for the benefit of the other as to purchases of real estate, when more than twenty years have elapsed since the accrual of the right, before suit brought, during all of which period the defendant denied and disregarded the rights of the other alleged partner; and the fact that the partners were brothers, complainant being averse to litigation, and on that account failing to sue in time, will not alter the case.—*Phillippi v. Phillippi*, 41.

PARTIES.

See CHANCERY, and PLEADING AND PRACTICE.

PAYMENT.

1. *Receipt; when will not amount to satisfaction.*—A receipt in full, on payment of a less sum than was actually due by the sheriff, on a judgment against him and his sureties, for his failure to pay over money collected on execution, will not prevent the issue of execution afterwards to collect the statutory damages, where the plaintiff in the judgment was ignorant of his right to any damages, at the time the receipt was given; in that event, the receipt will only operate as satisfaction *pro tanto*.—*McArthur v. Dane*, 539.

2. *Payment of money order to impostor; when telegraph company is not liable for.*—An impostor at Cincinnati, sent a dispatch in the name of B., over defendant's line, to C. at Selma, Alabama, requesting C. to send a telegraphic money order to B. at Cincinnati. C. thereupon purchased of defendant, at Selma, a telegraphic money order payable to B. at Cincinnati, and defendant paid the money there to the impostor, who was the sender of the message,—*held:*

1. Where there is nothing to create suspicion in the minds of the agents of the telegraph company, it is the duty of the party of whom the request is made to remit the money, to ascertain for himself whether he who makes the request, is the person he professes to be.

2. In the absence of anything generating suspicion, the telegraph company has no right to refuse payment of the money to him in reply to whose message it was sent; and is not liable for a payment made *bona fide* to such person, though it turns out that he was an impostor. *W. U. Tel. Co. v. Meyer*, 158.

3. *Payment; what does not amount to.*—The renewal of the evidence of a debt secured by mortgage, is not a payment; nor does it impair the lien of the mortgage.—*Helmetag v. Frank*, 67.

See TENDER.
VENDOR AND PURCHASER.

PENALTIES.

1. *Imposition of penalty; when not invasion of chartered rights.*—Where a law, when a corporation is formed, or which it afterwards accepted, exacts certain duties of it, a subsequent statute imposing a penalty, where none existed before, for a failure to perform such duties, does not impair any corporate right or otherwise violate the constitution. *M. & M. R'y Co. v. Steiner, McGehee & Co.* 559.

PERJURY.

See CRIMINAL LAW.

PLEADING AND PRACTICE.

I. COMPLAINT.

1. *What complaint discloses substantial cause of action.*—A receipt given by the husband to his wife, acknowledging that he had received from her a certain amount of money, for investment, with a like amount of his own, in certain exchange which he purchased, and that the wife was entitled to one-half of the proceeds when sold,—is not a contract between husband and wife, within the meaning of the statute forbidding their contracting with each other; and a complaint by the wife's administrator against the husband's personal representative, claiming a sum certain as due according to such receipt, which is set forth, discloses a substantial cause of action.—*Haynie v. Miller*, 62.
2. *Case; what counts are in.*—A count seeking recovery for personal injuries, occasioned by falling in a ditch dug by defendant in the public highway, and averring that the injury was suffered and caused by the gross negligence of defendant in cutting the ditch and leaving it exposed, without proper safeguards, &c., is in case; and so also, is a like count, which alleged a duty of defendant to furnish bridges, barricades, or other usual means, to protect the public from injury, which defendant failed to provide, and that plaintiff suffered the injury by reason of the gross negligence of defendant, in cutting the ditch and leaving it exposed, without using proper precautions to guard the public, &c.—*S. & N. A. R. R. Co. v. Chappell*, 527.

II. PLEAS.

3. *Plea; what bad.*—A plea professing to answer the whole declaration or complaint, is bad on demurrer, if it answers part only.—*Galbreath v. Cole*, 139.
4. *Same.*—A count for "*goods sold and delivered*" covers a sale, at a stipulated price for cash, or on a credit which had expired before suit was brought; and as the statute of limitations of three years, applies only to open accounts, where some term of the contract is not settled by the parties, the plea, when interposed to a demand for "*goods sold and delivered*," is bad on demurrer, unless it states that the demand was an open account.—*Ib.* 139.
5. *Plea of misnomer; effect of failure to present.*—Misnomer of a party, if not pleaded, is waived, and when it is necessary to plead the judgment, the real party may connect himself with it, by averment of his proper name,—a garnishee can not abate the proceedings against him for want of correspondence between the name of the plaintiff in the garnishment and in the judgment.—*Lehman, Durr & Co. v. Warner*, 455.
6. *Plea of tender; what insufficient.*—Where the purchaser of lands conveyed under the mortgage sale, brings ejectment against the mortgagor, the latter's plea that, before suit was brought, and within the time prescribed by statute, he tendered the amount required to redeem,—the plea not being accompanied by deposit with the clerk of the amount tendered—presents no defense to the action, and should be rejected, on motion.—*Alexander v. Caldwell*, 543.
7. *Plea; what dispenses with proof of paper title.*—A mortgagor in possession, pleading in bar of ejectment, by one claiming under a purchaser at the mortgage sale, that after the sale he became tenant of the purchaser, and made him the proper statutory offer and tender for redemption, thereby admits of record that such purchaser then had title, and takes upon himself the onus of showing that he redeemed under the statute.—*Ib.* 543.

PLEADING AND PRACTICE.—*Continued.*

III. REVIVOR.

8. *Revivor: within what time must be made.*—Under our statutes, *revivor* in favor of or against the legal representative can not be made, if moved for after eighteen months from the occurrence of the event which renders it necessary; and the same rule applies where *revivor* is sought in the name of a succeeding administrator, or other successor in the right to sue or be sued, in place of one removed, as where *revivor* is made necessary by the death of a party.—*Brown v. Tutwiler*, 372.
9. *Same.*—The fact that the suit was brought by an administratrix, on a contract made with her as such, and that *revivor* was sought in the name of the succeeding administrator upon her removal, within eighteen months after it was made known to the court, though a longer period had elapsed since the removal was made, does not alter the rule. *Ib.* 372.

IV. GENERAL PRACTICE.

10. *Rebutting examination; discretion of lower court as to.*—The general rule, that a rebutting examination must be confined to the matters of the cross-examination, is not inflexible, but may be varied in the discretion of the presiding judge, according to the circumstances of the particular case, and the appellate court will not interfere with the exercise of such discretion, unless it be very clear that the party complaining has been injured.—*Wagner v. Simmons & Co.*, 144.
11. *Same.*—The mere repetition in rebuttal, of facts stated by the witness on his original examination, does not injure the party against whom his deposition was taken, and is not ground for reversal.—*Ib.* 144.
12. *Re-examination of witness; when not error to refuse.*—The re-examination of a witness, at the instance of a party who has already introduced and examined him, that he may repeat his testimony, rests within the discretion of the primary court, and the exercise of that discretion is not revisable.—*Newbrick & Bros. v. Dugan*, 251.
13. *Introduction of evidence; what ruling as to, not revisable.*—It rests within the sound discretion of the court, to allow a party to introduce further evidence, even after the close of the argument; and the exercise of that discretion is not revisable.—*Carter v. Wilson*, 434.
14. *Charge; when properly refused.*—The court is not bound to modify or reform instructions requested; and if asked in terms which may mislead, or require explanation or modification, they may be refused. *Ladd v. Dubroca*, 251.
15. *Lost instrument; rule as to proof of contents.*—As a general rule, where the loss of a written instrument is sought to be proved, its loss should be shown, before allowing evidence of its contents; but it rests in the sound discretion of the lower court to modify, or change, the rule in a particular case.—*Conoly v. Gayle*, 116.
16. *Order of introducing evidence, ruling as to; what not erroneous.*—Proponent was a witness, as to the loss of the will, and contestant, on cross-examination, exhibited a copy of a bill in chancery, filed and verified by her prior to that time, which she made affidavit to, knowing it averred that decedent died intestate. By agreement of counsel, it was expressly understood that this copy was to be read in evidence, but contestant declined to do this, until proponent closed her evidence; and thereupon the court, at proponent's instance, required the copy to be read then,—*held:* not error.—*Ib.* 116.

PRINCIPAL.

See SURETY.

RAILROADS.

1. *Case adhered to.*—The court adheres to its decision in *State, ex rel. Harrell, v. Mobile and Montgomery Railway Company*, 59 Ala. 325, that the second section of the act of April 19th, 1874, which provides that railroad companies "may for the transportation of local freight, demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight, over the whole line of its road,"—does not authorize the addition of fifty per cent. on the charge over the whole road, irrespective of the distance the freight may be carried, but only an additional fifty per cent. more per mile, for the distance local freight is carried, than the per mile rate charged on goods carried over the whole line.—*M. & M. R. Co. v. Steiner, McGehee & Co.*, 559.
2. *Act of April 19th, 1873, construed.*—The rate on freight "*carried over the whole line of its road*," which furnishes the basis for the additional fifty per cent. allowed by that act, for the transportation of "local freight," is the rate charged on freight taken on at one terminus and discharged at the other; and not the rate for freight brought from or carried to a point beyond the termini of the road.—*Ib.* 559.
3. *Same.*—The rate which furnishes the basis on which local freight charges must be graduated, is the rate prevailing at the time of the shipment; and rates at any particular time in the past furnish no reliable guide for ascertaining present rates.—*Ib.* 559.
4. *Corporation formed under act to constitute the purchasers of a railroad, &c., a body corporate; rights and powers of.*—When the purchasers of a railroad form a corporation under the provisions of the statute—act "to constitute the purchasers of any railroad heretofore sold under authority of any law of this State, a body corporate and politic," approved December 17th, 1873, and amended March 20th, 1875—the new corporation succeeds to the franchises, faculties and powers of the old corporation precisely as surrendered or lost; though as to ownership of property and liabilities, it is a new corporation.—*Ib.* 559.
5. *Effect of acceptance of restrictions on corporate power not embodied in charter.*—If a railroad corporation, though originally chartered without restrictions as to the right to fix tolls, accepts a limitation or restrictions of such powers, on a valuable consideration—*e. g.*, as one of the conditions on which it receives aid from the State—such limitation inheres in its organic law, precisely as if originally incorporated therein; and a new corporation, formed by those purchasing its property, &c., under our statutes, succeeding only to the rights of the old, is bound by such limitations.—*Ib.* 559.
6. *Imposition of penalty; when not invasion of chartered rights.*—Where a law, when a corporation is formed, or which it afterwards accepted, exacts certain duties of it, a subsequent statute imposing a penalty, where none existed before, for a failure to perform such duties, does not impair any corporate right or otherwise violate the constitution. *M. & M. R'y Co. v. Steiner, McGehee & Co.* 559.
7. *Voluntary payment; what not.*—The nature of the business considered, the shipper does not stand on equal terms with the carrier, in contracting for charges for transportation; and if the shipper pays the rates established in violation of law by the carrier, rather than forego services, such payment is not voluntary, in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge.—*Ib.* 559.
8. *Constitution of 1868; effect of, as to power to amend charter.*—The act to constitute the purchasers of any railroad, &c., a body politic and corporate, having been enacted since article 13 of the constitution of 1868 became operative, and it, and similar provisions in the present constitution providing that the general laws, under which corporations may be framed, may be amended, altered or repealed, corporations thus formed are subject to legislative control.—*Ib.* 559.

RAILROADS—*Continued.*

9. *Act of April 19th, 1873; penalties imposed by, not repealed.*—The penalties imposed by act of April 19th, 1873, are not repealed by the provisions of the "act to prevent excessive charges by railroad companies," approved March 17th, 1875.—*Ib.* 559.
10. *Effect of act repealing "act to furnish the aid and credit of the State of Alabama, for the purpose of expediting construction of railroads within the State."*—The repeal of the act under which the aid and credit of the State were extended to railroads, upon the conditions therein recited, does not have the effect to release them from the restraints imposed by the fifteenth section of that act as to tolls and charges; nor to release the Mobile and Montgomery Railroad Company, to whose rights the appellant succeeded, from the restrictions imposed by section eight of the special act, under which the Mobile and Montgomery Railroad Company obtained State aid.—*Ib.* 559.
11. *Negligence; what fixes charge of, on railroad company.*—The failure to ring the bell or blow the whistle on the starting of the train, as required by the statute, fixes the charge of negligence on a railroad company; and any one injured thereby may recover damages for the injury, unless his own negligence or fault has disabled him from making complaint.—*M. & C. R. R. Co. v. Copeland*, 376.
12. *Contributory negligence; what will defeat recovery.*—Plaintiff's intestate got off a passenger train of defendant, which had just arrived in a small incorporated town, and attempted to crawl between two cars of a freight train standing on a side track, with locomotive attached and steam up, ready to start, which stood between him and the depot. Those in charge of the freight train did not see him, and backed it without giving proper signals, just as he got between the cars,—*held:* The conduct of the deceased can not be classed less than negligence, bordering on recklessness, and contributed proximately to his death, and his personal representative can not recover, though defendant was negligent in not giving proper signals before its train started—the injury not having been inflicted wantonly or intentionally.—*Ib.* 376.
13. *Corporation; what duty owes employes, in selection of fellow-servants.* A railroad corporation owes a duty to its employes, to exercise due care and diligence in the selection and appointment of their fellow-servants, and is answerable for injuries resulting from its want of care or skill, in these respects; though if these have been observed, it is not responsible to one servant, for injuries resulting from the negligence of his fellow-servant.—*Tyson v. S. & N. A. R. R. Co.* 554.
14. *Same; delegation of power of appointment, effect of.*—Whoever exercises the power of appointing and removing employes or servants, though his grade of employment as to other matters, makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employes, are the negligence or mistakes of the corporation, for which it must answer.—*Ib.* 554.

RECEIPT.

See Action.
Payment.

RECEIVER.

1. *Receiver; when evidence as to necessity of appointing, will not be closely scrutinized.*—Where the mortgagor who agreed, in the mortgage, to insure the property, pay taxes, and keep it in repair, failed to do so, and was shown to be insolvent, this court will not closely scrutinize conflicting evidence, as to the value of the mortgaged premises, upon which a receiver was appointed.—*Eslava v. Crampton*, 507.

See Chancery, 3.

REDEMPTION.

1. *Redemption; confessed judgment, not available to defeat.*—Our statutes prohibit the use of a confessed judgment to a purchaser, who is resisting redemption of the debtor's property sold under judicial process, as well as to a creditor who is seeking to redeem it.—*Mobile Mutual Insurance Co. v. Steele*, 253.

REFERENCE.

See CHANCERY, 11.

REGISTER.

1. *Register acting as judge; what record should show.*—When the register in chancery assumes the jurisdiction conferred by statute, where the probate judge is incompetent, the record should affirmatively show the facts which authorize its exercise,—bare recitals in the orders made by him, is an irregular mode of disclosing it.—*Thornton v. Moore*, 348.
2. *Same; duties of.*—When the judge of probate is a creditor, having a claim filed against an insolvent estate, he becomes incompetent, not only as to that claim, but as to the entire administration; and whatever of judicial duty is to be performed in reference to it, must be performed by the register.—*Ib.* 348.

REMOVAL OF CAUSE.

1. *Removal of suit to Federal Court.*—Under the twelfth section of the judiciary act of 1789, as also under the act of Congress of 1867, a suit could not be removed from the State to the Federal court unless all the parties on one side are residents, and all on the other side non-residents of the State in whose court the suit is brought.—*Ex parte Grimball*, 598.
2. *Same.*—Whether the act of Congress of July 27th, 1866, as to the removal of suits from State to Federal courts, is repealed by the later act of March 3d, 1875, is not decided; but the court treats the present application as though both statutes were in force.—*Ib.* 598.
3. *State court, power and duty of on petition for removal.*—The jurisdiction of the State court is not *ipso facto* ousted by the filing of the petition and bond for removal; the court must examine the petition, in connection with the cause to which it relates, to determine whether the cause and the petitioner's connection with it, entitle him to the removal, and it is not until this is ascertained that the jurisdiction of the State court ends.—*Ib.* 598.
4. *Case; what not removable.*—M. died leaving lands and personalty here, managed by C., trustee, under the will, with authority to pay over the net income of the share of testator's daughter to her, or to her husband if she married. She married G., (who resides in New York,) and died domiciled there, intestate and childless. The trust property was claimed by Mrs. G.'s brothers and sisters under the will; also by R. as Mrs. G.'s administrator, who claimed adversely to them; G. claimed the property under the laws of New York. C., the trustee, who resided in Alabama, filed his bill in the State court against G, R., Mrs. G.'s administrator, and her brother and sisters, and others for a settlement of the trust, and for instructions how to dispose of the trust estate. G. was the only non-resident, and he made application to have the cause removed to the Federal court,—*held:*

   1. There is no act of Congress which authorized the removal.
   2. G. can obtain his distributive share of the wife's personalty, only through R., the administrator, who is an indispensable party, and the controversy of G. is not only with him, but also with G.'s other co-defendants, who claim adversely both to G. and the administrator, all of whom are residents of Alabama except G.; hence the case is not

REMOVAL OF CAUSE—*Continued.*

"a controversy which is wholly between citizens of different States, and can be fully determined between them," and can not be removed under the act of Congress of 1875, upon the petition of one of several defendants; and not being a suit to restrain or enjoin G., and his controversy being really with G.'s co-defendants mainly, which can not be disposed of without their presence, the cause is not removable under the act of Congress of 1866.—*Ib.* 598.

REVIVOR.

See that title, under PLEADING AND PRACTICE.

REVIEW—BILL OF.

See CHANCERY, 6.

SALE.

See VENDOR AND PURCHASER.
TAXES.

SET-OFF.

1. *Commercial paper; what defenses may be made to.*—The indorsee of commercial paper acquiring it after maturity, or before maturity merely as collateral security for a pre-existing debt, takes it subject to all the defenses which the maker could prefer against the payee, if he had remained the holder; and this right exists as to matters of set-off and discount, as well as to defenses affecting the instrument itself.—*Pres't Bank of Mobile v. Poelnitz*, 147.
2. *Set-off; what does not destroy right of.*—One of several joint debtors is entitled to set-off a debt due to him alone from the common creditor, when sued upon the joint debt.—*Ib.* 147.
3. *Same; when resort can not be had to equity, to enforce.*—A surety on a promissory note on which the payee or endorsee brings an action at law, can not go into equity to enjoin the action and to obtain the benefit of a set-off, when such set-off was due at the commencement of the action, and is of such a nature as to be made available at law, without embarrassment or difficulty; and the fact that the payee is insolvent is immaterial, and furnishes no ground for resort to equity.—*Ib.*

SHERIFF.

See CHANCERY, 17.
DAMAGES.

STALE DEMAND.

1. *Stale demand; rule as to.*—Where a claim is sought to be enforced, *prima facie* within the operation of the rule against stale demands, the complainant should show by positive and specific allegations, some act or recognition of the party sought to be charged, within the period which will take the case out of the rule; mere general and vague averments of facts and circumstances, out of which the right sought to be enforced arises, or on which recognition of it is sought to be based, will not suffice.—*Phillippi v. Phillippi*, 41,

See SURETY, 5.

SUPERSEDEAS.

See ERROR AND APPEAL, 22.
GARNISHMENT.

STATUTES AND CODE OF ALABAMA.

1. *Repugnant statutes in same Code; how construed.*—Where repugnant statutes are incorporated in the same Code, the original statutes, their

STATUTES AND CODE OF ALABAMA—*Continued.*

dates, and even their judicial interpretation will be consulted, to ascertain the legislative intent.—*Steele v. State*, 213.

2. "Act supplementary to corporation laws of Alabama," approved November 18th, 1863; effect of.—*Cahall & Pond v. C. M. B. Ass'n*, 232.
3. Code, § 540 of, what case does not fall within.—*Gill v. State*, 169.
4. Code, § 2149; construed.—*Turner v. McFee*, 473.
5. Code, § 2574; construed.—*Thornton v. Moore*, 351.
6. Code, § 2849; what plea good under.—*Goetter, Weil & Co. v. Pickett*, 337.
7. Code, §§ 2879, 2997; construed.—*Alexander v. Caldwell*, 543.
8. Code, § 2908; revivor.—*Brown v. Tutwiler*, 374.
9. Code, § 2948; construed.—*Jones v. Morris*, 518.
10. Code, § 4130; construed.—*Wilson v. State*, 150.
11. Code, § 4203; construed.—*Ivey v. State*, 58.
12. Code, § 4204 *et seq.*; construed.—*Ulmer v. State*, 208.
13. Code, § 4205; requisites of requisition.—*Bain v. State*, 75.
14. Code, § 4398; construed.—*Daniel v. State*, 5.
15. Code, § 4417; construed.—*Johnson v. State*, 9.
16. Code, § 4450; what repeals.—*Steele v. State*, 213.
17. Code. § 4917; costs.—*Greene County v. Hale County*, 72.
18. Code, §§ 4978, 4992; construed.—*Ex parte Knight*, 483.

SURETY.

1. *Surety; what creates the relation of.*—Where parties desiring to purchase parts of a tract of land, of unequal quantities, but not inequal in value except as to the difference in quantity, procure one of them to purchase the entire tract in his name, they joining in the note for the purchase-money—all are jointly and severally bound as principals to the vendor; but as between themselves, each is principal only for the share of the purchase-money he was bound to pay, and a surety for the remainder.—*Owen v. McGehee*, 440.
2. *Contribution; right to.*—The right to contribution, where one discharges more than his just share of a common burden, does not necessarily arise from contract, but has its foundation in natural justice; the principle applies not only to the relation of principal and surety, but to that of original contractors, and whenever parties stand in a relation in which equality of burdens is equity between them —*Ib.* 440.
3. *Same; right to share in benefits acquired by person bound to contribute to another.*—Wherever persons stand in such relation to a common burden, that contribution between them will be compelled, neither can speculate on the common liability, and whatever benefits or advantages are acquired by one in dealings with the common creditor, enure equally to the benefit of all.—*Ib.* 440.
4. *Same.*—A co-surety who gives his individual note to the common debtor, who accepts it in payment and compromise of the debt, is entitled to contribution from the other sureties for their *pro rata* share, though he afterwards became insolvent, and failed to pay the note to the common debtor.—*Ib.* 440.
5. *Contribution, delay in enforcing; when not bar to.*—Contribution may be refused to a surety, when his conduct has been such as to work injustice or injury to the principal or co-sureties; but when injury has not been produced by delay, and lapse of time has not worked a bar, mere passiveness in asserting his right, will not prejudice a claim to contribution.—*Ib.* 440.
6. *Administrators; effect of judgment as to sureties.*—A creditor can not maintain an action at law on the bond of an administrator, until his debt or demand is first reduced to judgment or decree, by a court of competent jurisdiction; and such judgment, in the absence of fraud, is conclusive against the sureties, as to the existence of the debt,

SURETY—*Continued.*

Whether or not the judgment would have that effect against sureties subsequently joining the administrator in the execution of an additional bond, is immaterial, when they do not controvert the existence of the debt, and the only purpose for which the judgment is offered, is to prove its existence, and the duty of the administrator, resulting therefrom, to apply assets coming into his hands for the satisfaction of the debt.—*May v. Kelly*, 489.

See COSTS, 4.

TAXES.

1. *Tax sale; when void.*—Under the revenue law of 1868, the tax-collector had no authority to sell lands for non-payment of taxes, until after advertisement showing, among other things, the name of the owner when known, &c.; and where lands were given in for assessment and assessed against the true owner, an advertisement describing them as belonging to an entirely different person, confers no authority to sell, and the purchaser at such sale does not acquire title. *Milner & Co. v. Clarke*, 258.
2. *Adverse possession; when commences under tax title.*—If a purchaser at tax sale of lands, enters into possession under the purchase before the delivery of the deed, *bona fide* claiming title, his possession is adverse from its inception, and not merely from the date of the delivery of the deed; though its delivery may be necessary to constitute color of title. *Ladd v. Dubroca*, 25.

TELEGRAPHIC MONEY ORDER.

See PAYMENT, 2.

TENDER.

1. *Plea of tender; what insufficient.*—Where the purchaser of lands conveyed under the mortgage sale, brings ejectment against the mortgagor, the latter's plea that, before suit was brought, and within the time prescribed by statute, he tendered the amount required to redeem,—the plea not being accompanied by deposit with the clerk of the amount tendered—presents no defense to the action, and should be rejected, on motion.—*Alexander v. Caldwell*, 543.

TRESPASS.

See CRIMINAL LAW, 69, 71.

TRUST AND TRUSTEE.

See GUARDIAN AND WARD.
EXECUTORS AND ADMINISTRATORS.

USURY.

1. *Usury; how must be set up.*—One who has made usurious payments on a debt, can not obtain credits therefor, unless he distinctly and correctly sets forth in the pleadings, the terms and nature of the usurious agreement, and the amounts of the payments.—*Munter & Faber v. Linn*, 492.
2. *Same; what allegations not sufficient to put in issue.*—A mortgagor who, upon dispute with the mortgagee as to the amount due, files his bill to ascertain the mortgage indebtedness, and for a sale of the property, if necessary for its payment—does not by the general allegation that "from time to time he has made various payments" on the mortgage debt, which reduce it below the amount the mortgagee claims, put in issue the right to credits for payments, beyond eight per cent. per annum, made to the mortgagee not as credits on the debt, but for forbearance, and to induce him not to foreclose, after the debt matured. *Ib*, 492.

USURY—*Continued.*

3. *Same.*—Nor in such a case, is the defect of the bill cured, by a consent decree directing the register "to state an account of the amount due the mortgagee upon the mortgage debt, allowing him eight per cent. interest upon the debt after maturity, and deducting therefrom all sums of money paid the mortgagee at the date of the several payments." Such decree, when tested and construed with reference to the pleadings, relates only to payments made as such, on the debt, and not to usurious exactions paid merely for forbearance.—*Ib.* 492.
4. *What will not render mortgage usurious.*—A stipulation in the mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee attorney's fees incurred in collecting the debt, will not render the agreement usurious; but a reasonable amount only can be collected, though a larger sum or per cent. is agreed on. *Ib.* 492.
5. *Brokerage in addition to interest; when will not render loan usurious.* Where a loan is negotiated through a broker, who, by arrangement with the borrower, received commissions for effecting the loan, the fact that the broker allowed the lenders to share in such commissions, in order to induce them to take the loan, will not brand the transaction as usurious, when it is shown that such action on the broker's part was a mere gratuity, and not part of a scheme to avoid the laws against usury.—*Eslava v. Crampton*, 507.
6. *Usury; what will not avoid.*—A mere renewal of the debt or change of securities, between the same parties, will not purge the usury; and where one shown to have already loaned money to complainant at usurious rates, takes another loan and security, which she assails as a mere renewal of the old usurious debt with change of security, he must make good his defense by clear and satisfactory proof, that the second transaction was not part of a device to avoid the usury laws.—*Ib.* 507.

VENDOR AND PURCHASER.

1. *Abatement of purchase-money of land; when may be claimed.*—Where by the terms of a contract of sale of lands, the price is fixed or regulated by the quantity, and there is a material mistake as to the real quantity, the vendee is entitled to compensation for the deficiency; or when sued for the purchase-money, may claim compensation by way of abatement from it.—*Winston v. Browning*, 80.
2. *Same; when can not be claimed.*—Where, however, the contract is not for the sale of a specific quantity of land, but for the sale of a particular tract, or designated lot or parcel, by name or description, for a sum in gross, and the transaction is *bona fide*, a mutual mistake as to *quantity*, but not as to boundaries, will not entitle the purchaser to compensation, and is not ground for rescission.—*Ib.* 80.
3. *Failure or defect of title; when not available to defeat recovery of purchase-money of land.*—In the absence of fraud, mistake, or warranty, defect or failure of title in the vendor, is not available to the vendee to defeat or abate recovery for the purchase-money of lands.—*Tobin & Bell v. McMahon*, 125.
4. *Same.*—B. purchased a lot, taking the agreement of R., who professed to be agent of the owner, to procure a conveyance. B. endorsed on the agreement that the purchase was made for T.'s benefit, and authorized a conveyance to him. T. afterwards sold this lot, and two others to which he had title, to B., agreeing upon payment of the deferred installment of purchase-money, "to return the original title papers," properly endorsed to B. No fraud or mistake occurred. R.'s authority was repudiated, no title could be obtained to the third lot, and B., who entered under the contract with T., was evicted. The value of the other two lots, the title to which was not disputed, did not exceed the cash payment, while the value of the third equalled the

VENDOR AND PURCHASER—*Continued.*

amount of the deferred payment,—*held:* T. was entitled to enforce a vendor's lien for the whole amount of the purchase-money, against the other lots.—*Ib.* 125.

5. *Vendor's lien; resulting trust what does not create.*—One who advances money to the vendee to pay the deferred payment on a purchase of lands, or pays the amount, at the vendee's request, to the vendor who conveys to the purchaser, has no vendor's lien on, or resulting trust in the lands.—*Chapman v. Abrahams*, 108.

6. *Vendor's lien; what not bar to enforcement of.*—In the absence of any agreement to the contrary, the vendor retains a lien on lands for the unpaid purchase-money, though he has made an absolute conveyance in fee to the vendee, and put him in possession; and the fact that the debt, as a mere legal demand, is barred by the statute of limitations, is no bar to the enforcement of the lien in equity.—*Flinn v. Barber*, 530.

WILLS.

1. *Will; what does not vitiate.*—Irrelevant recitals will not vitiate a will, and if it be duly attested by the requisite number of subscribing witnesses, the fact that another of the subscribing witnesses was incompetent to prove its execution, is entirely immaterial.—*Conoly v. Gayle*, 116.

2. *Will, construed.*—Testator died seized of certain lands, leaving two sons legatees and devisees under the will, which was duly probated. The will devised and bequeathed to each of the sons, John and James, one-half of the estate, real and personal, for the term of their natural lives, with provision that if either died before arriving at age, or without lawful issue, the estate should go to the surviving brother. The will further provided, that the portion of the estate which shall be allotted to John, should "be sold by his guardian according to law, (the will not nominating any,) and the funds placed at interest." The executors named in the will, qualified, and they were appointed guardians of John, by the Probate Court. The executors, under order of the Probate Court, purchased lands of one Broxen, pursuant to a parol contract made by the testator, taking title to the heirs as such. John afterwards died intestate of full age, without lawful issue. The guardians, without order of any court, sold all the right, title and interest of John in all the lands,—*held:*

1. The will did not authorize the guardians to sell the interest or share of John in the Broxen lands.

2. Their sale of John's interest in the lands devised was also void—the will contemplating a sale only after division, and then under order of a court of probate or equity.—*Jones v. Morris*, 518.

WITNESS.

1. *Witness; competency of.*—The exception to the competency of witnesses, as declared by statute, (Code, § 3058,) relates to "transactions with, or statements by a deceased person," whose estate is interested, &c., and does not disqualify a legatee or devisee, under a will propounded for probate, from testifying as to other matters connected therewith: hence, when such person is offered as a witness, a general objection to his competency can not be entertained: but objection should be made to such testimony as infringes the rule declared by the statute.—*Conoly v. Gayle*, 116.

2. *Witness; how may be impeached.*—The character of a witness may be impeached, by the testimony of a person who three years before and previously lived in the same neighborhood with him, and knew his past and present general reputation and character there, though such person

LAW LIBRARY OF University of MICHIGAN.

WITNESS—*Continued.*

knows nothing of them in another neighborhood, to which the witness removed, and where he then resided.—*Kelly v. State*, 19.

3. *Age of witness; what evidence of admissible.*—A witness may testify to his own age, though he states that his knowledge is derived from what his mother told him; and the fact that his mother, who was not shown to be dead, or out of the jurisdiction of the court, was not introduced, does not affect the admissibility of the evidence, though the jury may consider it, with the other circumstances of the case, in determining its credibility.—*Bain v. State*, 76.

4. *Sustaining witness.*—It is error to allow a witness, who confesses having written the forged instrument under the direction and at the request of the prisoner, to write in the presence of the court and jury a similar instrument, for the purpose of comparison between the two, or to sustain such witness, when impeached.—*Williams v. State*, 33.

5. *Expert, opinion of; when admissible.*—A physician and surgeon of "long experience with gun-shot wounds, and an expert in such matters," who saw the body of the deceased shortly after she received a wound, may give his opinion as to how it was inflicted.—*Rash v. State*, 80.

6. *Same.*—One who had been in the late war, and "saw the range of balls in a good many gun-shot wounds, but was not a physician or a surgeon, or an expert," can not be permitted to testify as to "how the balls range, and some of the wounds which the witness had seen." *Ib.* 89.

7. *Same.*—A medical man, though not personally cognizant of the facts, may give his opinion as to the result of a wound or the cause of death, upon the facts proved on the trial; but where the facts are disputed, he can not give his opinion on the case on trial, but must be examined hypothetically, and his opinion on the state of facts which the jury regard as proved, then becomes evidence.—*Page v. State*, 16.

8. *Same.*—Not only the cost of erecting a mill and placing machinery in it, but also their enhanced value by reason of location, other circumstances, and the general patronage and profits derived from it, may be considered in determining the value of the mill; and a person shown to be conversant with these matters, may give his opinion as to value.—*Hudson v. State*, 334.

9. *Evidence: what not admissible to refresh recollection.*—Entries upon the tax books, not made by the owner, or under his direction or authority, showing the assessed value of a mill, are not admissible for the purpose of refreshing his memory, as to who returned the property for taxation, or the amount at which it was assessed.—*Ib.* 334.

WRIT OF ERROR.

See CRIMINAL LAW, 63.